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In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN F. LEHMAN, JR., SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

YVONNE G. TROUT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in light of this Court's subsequent decision in *United States Postal Service Board of Governors* v. *Aikens*, No. 81-1044 (Apr. 4, 1983), the court of appeals erred in affirming the judgment of the district court despite concluding that the statistical analysis upon which that court had relied in finding discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e *et seq.*), included data that could not form a basis for imposing liability.

Our primary submission is that, because of the errors in the district court's analysis identified by the court of appeals, no violation of Title VII has been established under the standard prescribed in *Aikens*, and the judgment of the court of appeals should accordingly be summarily vacated and the case remanded for reconsideration in the light of *Aikens*. If this Court nevertheless decides to set this case for plenary review, two additional questions are presented:

2. Whether intentional discrimination is established in a class action suit involving professional technical positions by a statistical analysis that fails to account adequately for minimum objective qualifications for those positions.

3. Whether, in remedial hearings after a class-wide violation of Title VII has been found, the burden shifts to the employer to demonstrate "by clear and convincing evidence" that its employment decisions with regard to particular individuals were based on legitimate, non-discriminatory factors.

PARTIES TO THE PROCEEDINGS

The petitioners are John F. Lehman, Jr., Secretary of the Navy, and Capt. James C. Richardson, Jr., Commanding Officer of the Navy Regional Data Automation Center. The named respondents representing the class are Clara A. Perlingiero and Yvonne G. Trout. In addition, the individual claims of Marie Bach, Charlene Hardy, and Joan S. Creighton were consolidated with the class action in the district court, and Bach's appeal was consolidated with the class action in the court of appeals. Hardy and Creighton did not appeal from the district court's denial of their claims; Trout's individual appeal was rejected and this Court denied her individual petition for certiorari on April 18, 1983 (No. 82-1429).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of the Navy and the Commanding Officer of the Navy Regional Data Automation Center, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-39a) is reported at 702 F.2d 1094. The opinion of the district court (App., *infra*, 40a-70a) is reported at 517 F. Supp. 873.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1983. Rehearing was denied on May 31, 1983 (App., *infra*, 73a). The time for filing a petition for a writ of certiorari was extended to and including October 28, 1983, by Justice Brennan on August 15, 1983.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 717(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (Supp. V) 2000e-16(a), provides in pertinent part:

> All personnel actions affecting employees or applicants for employment * * * in military departments as defined in section 102 of Title 5, * * * shall be made free from any discrimination based on race, color, religion, sex, or national original.

STATEMENT

1. Four cases involving individual and class sex discrimination claims under Title VII were brought against petitioners (the Secretary of the Navy and the Commanding Officer of the Navy Regional Data Automation Center) and consolidated for trial in the United States District Court for the District of Columbia. Respondents' class allegations were that the Navy intentionally discriminated in employment practices against "all female professional technical employees employed by the [Naval Command Support Activity] 'NAVCOSSACT' or the [Navy Regional Data Automation Center] 'NARDAC' at any time between June 6, 1972 and June 4, 1979."[1] App., *infra*, 41a. The employees involved performed computer-related tasks.

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[1] NAVCOSSACT was responsible for the Chief of Navy Operations' computer activities in the 1960's and 1970's. Among its duties were the development and operation of highly classified computer programs and systems relating to national defense. These activities included wargaming, telecommunications, and strategic command and control. The name of NAVCOSSACT was changed to NARDAC on March 17, 1977, when the Navy effected a major reorganization of its data processing activities. In order to consolidate these activities, data-processing personnel and support resources of the Navy Materiel Command Support Activity, the Navy Accounting and Finance Center and the Naval District, Washington, D.C., were transferred to NARDAC.

At trial, respondents relied on a computerized multiple regression analysis to show that women received lower salaries than men, in an attempt to show women were paid less than one would expect in the absence of discrimination. A multiple regression analysis is a statistical technique designed to estimate the effects of several independent variables on a given result. Properly used, such an analysis can show how much influence factors such as sex, experience, and education had on perceived disparities in salary levels. Here, the independent variables included in respondents' study were the following: (1) level (but not type) of formal education, (2) years between date of last education and entry into the federal service—in effect, the age at which the employee was hired, (3) length of service (but not type of service) with NAVCOSSACT and NARDAC, and (4) length of service (but not type of service) with the federal government. App., *infra*, 6a. After accounting for these four variables, the analysis attributed the remaining salary differences to the sex of the employees considered. Based on this analysis, which reflects the effects of pre-1972 actions on salaries within the plaintiff class as well as the effects of actions taken by agencies other than NAVCOSSACT and NARDAC, respondents' expert concluded that there was statistically significant adverse treatment of women at NAVCOSSACT and NARDAC.

Petitioners introduced evidence to show that this conclusion resulted from certain flaws in respondents' analysis, including the fact that respondents' study relied on data regarding employment decisions that could not form the basis of Title VII liability.[2] Accord-

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[2] To eliminate the effects of pre-1972 actions and actions taken by employees other than NAVCOSSACT/NARDAC, petitioners ran the same regressions used by respondents, but only for those employees *hired* by petitioners after 1972. In no year for which those regressions were run (1974-1979) was sex a statistically significant variable. Def. Exh. 204, at 4-6, Def. Exh. 205; Tr. 1427-1432, 1436-1437, 1500-1506.

ingly, petitioners' evidence excluded—and was the only evidence to exclude—employment decisions that the court of appeals ultimately held were not actionable—*i.e.*, the effect of pre-1972 actions and initial placement decisions. See page 6, *infra*,.[3] On the basis of this evidence, petitioners contended that when such irrelevant factors as pre-1972 actions and initial placement decisions were eliminated and persons with comparable computer experience were compared, women advanced in a statistically indistinguishable way from men.

2. Following a trial, the district court ruled that petitioners had discriminated against the class of women professional technical employees in initial grade placement and promotions, basing its finding largely on the regression analysis presented by respondents.[4] Essen-

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[3] This evidence included an extensive "cohort analysis" that grouped men and women who started at NAVCOSSACT and NARDAC at the same GS level at similar times and compared their advancements. In addition, applicant flow data presented by petitioners showed that women applying for promotions from September 1976 to 1979 had statistically the same treatment with regard to promotions as did their male counterparts.

In addition, petitioners filed a motion for reconsideration after trial based upon new statistical analyses. These new analyses were intended to further clarify two points: (1) an evaluation of NAVCOSSACT and NARDAC personnel files showed that women who were initially placed at NAVCOSSACT and NARDAC had 49% of the computer experience of men, and the generally lower initial placement level of women simply reflected their relative lack of computer experience; and (2) any showing of adverse treatment of women was eliminated when initial placement and time-barred acts were removed from the regression analyses. The district court rejected this evidence as untimely.

[4] The court also considered five individual claims, ruling in favor of respondents on two and against them on the remaining three claims. The court of appeals affirmed the district court's finding of discrimination against the two individuals, but modi-

tial to the district court's ultimate conclusion was its rejection of two arguments made by petitioners. First, the court ruled (App. *infra*, 46a-48a) that petitioners' objection to respondents' failure to distinguish between pre- and post-1972 actions was not valid because discrimination occurring before 1972 "even if coupled with neutral employment practices since then, produced actionable continuing discriminatory effects after 1972 * * *."[5] Second, the court rejected (App., *infra*, 48a) petitioners' contention that respondents' regression analyses were flawed because they placed responsibility on petitioners for decisions regarding initial placement of employees when hired by, or transferred to, NAVCOSSACT and NARDAC.[6]

Applying similar reasoning, the district court also rejected petitioners' statistical analyses, in large part because they did not take into account pre-1972 discrimination, App., *infra*, 57a, and because they "assumed that the employees studied were placed in an appropriate salary grade at the outset, and (the analyses) therefore could not and did not detect any bias in the hiring and placement process." App., *infra*, 56a (footnote omitted). Relying on its conclusion that pre-1972 ac-

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fied the relief awarded. We do not challenge the rulings regarding the individual claims in this petition.

[5] The court stated that it knew of no practical method of separating the effects of pre-1972 and post-1972 discrimination in a regression analysis (App., *infra*, 48a n.20).

[6] The district court also rejected petitioners' contention that respondents' regression analysis failed to account adequately for the minimum necessary objective qualifications of the positions at issue. That is, petitioners contended that the fundamental cause for the mistaken notion that sex discrimination caused the salary disparity between men and women in NAVCOSSACT and NARDAC was the failure of respondents' analyses to account for differences in computer-related experience. The district court rejected this argument on the ground that respondents' variables were sufficiently accurate to establish a prima facie case. App., *infra*, 49a-52a.

tions and initial placement decisions were actionable, the district court concluded that respondents' multiple regression analysis established a prima facia case, and that "applying the burden-of-production rule articulated by the Supreme Court in [*Texas Department of Community Affairs* v.] *Burdine*, [450 U.S. 248 (1981),] * * * the [petitioners] have not rebutted [respondents'] prima facie case of discrimination" (App., *infra*, 59a).

3. A divided court of appeals (MacKinnon, J., dissenting) affirmed in part and reversed in part the district court's ruling on the class claims presented in this case. It reversed the district court's holding that petitioners, rather than other federal agencies responsible for formulating federal personnel regulations, were responsible for determining the grade levels of new employees.[7] The appellate court also ruled that the district court's theory for permitting the inclusion of pre-1972 statistics in respondents' analysis "is flatly inconsistent with the Supreme Court's pronouncements in *Hazlewood School District* v. *United States*, 433 U.S. at 309-10, * * * and *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977)" (App., *infra*, 15a-16a).

Notwithstanding these rulings, the court of appeals affirmed the district court's decision that respondents had established a prima facie case that petitioners had violated Title VII with regard to promotions (App., *infra*, 17a-18a) and that petitioners had not rebutted that case (App., *infra*, 18a-19a).[8] The court acknowl-

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[7] In accordance with that determination, the court of appeals concluded that "the District Court erred in holding that the class was entitled to relief for discriminatory *initial placements*" (App., *infra*, 17a; emphasis in original).

[8] The court of appeals' opinion focuses almost exclusively on the statistical evidence presented. Without discussion, it notes that "the District Court properly considered the statistical and nonstatistical evidence on a cumulative basis in assessing the strength of the [respondents'] prima facie case." App., *infra*, 6a n.7.

edged (App., *infra*, 16a) that, because they group nonactionable employment decisions with actionable ones, respondents' analyses "hold the potential for some distortion"; it nonetheless concluded that respondents had established a prima facie case because their analyses "included a substantial amount of data covering post-1972 employment decisions affecting class members."[9]

The court of appeals also affirmed the district court's decision regarding the burden of proof that would be placed on the employer in remedial hearings held to determine liability to individual class members. Reiterating its ruling in *McKenzie* v. *Sawyer*, 684 F.2d 62, 76-78 (D.C. Cir. 1982), the court held (App., *infra*, 21a-22a): "Because such class members are presumptively entitled to relief upon showing that they were potential victims of the defendants' discriminatory practices * * * the defendants must 'rebut the plaintiffs' individual showing by clear and convincing evidence'. *McKenzie*, 685 F.2d at 78."

Judge MacKinnon dissented from the majority's imposition of class-wide liability. He argued that the district court had incorrectly allocated the burden of proof by requiring defendants to "*disprove* the plaintiffs' allegations" (App., *infra*, 29a; emphasis in original). Moreover, he concluded (*id.* at 31a) that the district court "was so concerned with the allocation of the 'stages' of proof, focusing upon whether the plaintiffs established a *prima facie* case and whether the defendant rebutted that case, that it lost sight of the basic principle that

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[9] Regarding petitioners' objection that respondents' analyses ignored the minimum objective qualificatons necessary for placement and promotion in the professional technical job series at issue, the court ruled (App., *infra*, 12a-14a) that respondents' variables were closely enough related to years of computer experience to provide an adequate basis for inferring disparate treatment.

plaintiffs were ultimately required to prove intentional discrimination by a preponderance of the evidence."

Petitioners filed a petition for rehearing, suggesting rehearing en banc. The court of appeals denied the petition, with Judges Tamm, Wilkey, MacKinnon and Bork dissenting (App., *infra*, 75a).

REASONS FOR GRANTING THE PETITION

The outcome of most Title VII litigation involving class-wide claims of discrimination is determined by the court's evaluation of statistical evidence and analyses. It is, therefore, crucial that such evidence be carefully analyzed, bearing in mind that the ultimate responsibility of the court is to apply the substantive principles of law underlying Title VII and, as this Court emphasized in *United States Postal Service Board of Governors* v. *Aiken*, *supra*, to determine whether, at the conclusion of the trial, plaintiffs have established that they have been discriminated against in violation of Title VII. The uncritical acceptance of statistical evidence, without regard to settled principles of law carefully developed by Congress and this Court's prior decisions, will inevitably undermine the objectives of Title VII. The courts below imposed liability relying on a statistical analysis whose conclusion was based, in critical part, on evidence that did not relate to employment decisions actionable under Title VII. The data offered in this case showed only that women in respondent's class generally occupy lower pay levels than men in a unit of the Navy that has recently increased substantially the number of its women employees, with resultant added concentration of women at trainee and entry level positions.

The district court and the court of appeals rendered their decision before *Aikens* was decided, and committed the same fundamental error as the lower courts in *Aikens*.[10] Had the court of appeals focused "directly

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[10] In our petition for rehearing, we called the court's attention to *Aikens* and its application to this case.

on the question of discrimination," *Aikens*, slip. op. 5, and decided whether plaintiffs, at the conclusion of the evidence, had established the existence of discriminatory employment practices, it would necessarily have concluded that there was no basis for affirming the district court's imposition of liability. The foundation of the district court's evaluation of the evidence was simply swept away by the court of appeals' ruling that the effects of pre-1972 actions and initial placement decisions could not form the basis for imposing liability. The district court relied on statistical evidence that factored in employment decisions that the court of appeals specifically found could not form the basis for imposing liability under Title VII, and rejected petitioners' statistical evidence precisely because it excluded such decisions. Once the court of appeals corrected those errors in the district court's legal analysis, there remained no reliable evidence upon which the appellate court could properly conclude that respondents had established, with respect to the class claims, any violation of Title VII by petitioners. Accordingly, the court of appeals should have either reversed the district court's decision or remanded the case to the district court for an evaluation of all the evidence under correct legal standards. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982).

The district court and the court of appeals agreed that the determination of whether defendants had engaged in class-wide discrimination "revolves primarily around the statistics submitted by the parties and the analysis of the statistics by the parties' experts" (App., *infra*, 42a, 6a). Statistical evidence "must be regarded with a substantial degree of caution," *Pegues* v. *Mississippi State Employment Service*, 699 F.2d 760, 766 (5th Cir. 1983), petition for cert. pending, No. 83-139, because the usefulness of statistics "depends on all the surrounding facts and circumstances." *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 340 (1977). No valid conclusions regarding petitioners' employment practices can be drawn unless

the statistical evidence is analyzed in accordance with legally correct interpretations of substantive Title VII Law. See *Pegues*, 699 F.2d at 767-768; *Pouncy* v. *Prudential Insurance Co. of America*, 668 F.2d 795, 803 (5th Cir. 1982); *Wilkins* v. *University of Houston*, 654 F.2d 388, 395 (5th Cir. 1981). In this case, the court of appeals premised liability on statistics which admittedly were not meaningfully tied to correct legal principles. When analyzed in light of those principles and of the government's evidence revealing their flaws, those statistics simply do not show that NAVCOSSACT and NARDAC discriminated against women in promotions during the relevant time frame. Yet the court of appeals, repeating the same error that court had made in *Aikens*, based its decision on whether respondents' evi dence was adequate to establish a prima facie case in the absence of evidence by the government proving the flaws in respondents' statistical presentation (App., *infra*, 10a-21a; Cf. *id.* at 31a-33a (dissenting opinion).

It is undisputed that the women in respondents' class in general occupy lower pay grades than men. It is, however, both erroneous and contrary to the purposes of Title VII for a court to leap from that fact alone to the conclusion that discrimination has caused the disparity. Recent recruitment efforts have brought more members of previously under-represented groups into the federal workforce in technical fields such as the computer operations involved here.[11] Substantial num-

[11] Evidence at trial (Def. Exh. 198, at 1-18; Tr. 1409-1425) showed that the selection of women for trainee positions at NAVCOSSACT/NARDAC generally compared favorably with their availability at the appropriate grade level both nationally and locally:

Grade	Total New Hires (1/1/72-3/12/72)	% Female Representation	Nationwide % Female Availability	Wash., D.C. % Female Availability
5	26	38.46	20.88	27.09
7	64	42.19	18.91	24.28
9	16	18.75	17.33	21.97

bers of women and minorities are accordingly necessarily clustered in entry level positions, and are paid accordingly. Until these inexperienced workers gain the requisite experience and training, and until vacancies occur at higher level positions, it cannot legitimately be expected that minorities and women will be equally distributed throughout an agency's workforce. See *Valentino* v. *United States Postal Service*, 674 F.2d 56, 72 n.29 (D.C. Cir. 1982). Unwarranted speculation, such as that of the court below, that the disparity between the numbers of men and women in higher level positions is the result of discrimination penalizes agencies for recruiting women and minorities at entry-level positions, thereby discouraging such recruitment efforts and, in the long run, tending to decrease the opportunities of these groups for advancement in new fields.

Moreover, the court of appeals' substantive rulings entirely eliminated the legal basis for the district court's conclusion that respondents' regression analysis established facts necessary to impose liability on petitioners. The court of appeals correctly ruled that two critical components of respondents' analysis were not legally relevant. First, it held that the district court had erred in ruling that petitioners' pre-1972 actions "even if coupled with neutral employment practices since then, produced actionable continuing discriminatory effects after 1972" (App., *infra*, 47a). As this Court said in *United Air Lines* v. *Evans*, 431 U.S. 553, 558 (1977) (emphasis in original): "the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists." Accordingly, here as in *Evans*, where the present system is neutral, pre-1972 acts of discrimination, alone, do not convert it into a violation of Title VII. Second, the court of appeals properly concluded that petitioners had established at trial "that initial grade placements were made by either the CSC [Civil Service Commission] or the OPM [Office of Personnel Management] or by em-

ploying agencies that were not made defendants in this case" (App., *infra*, 17a).[12] There was thus no basis for holding defendants here responsible for initial placement decisions.

The inclusion of data regarding pre-1972 actions and initial placement decisions necessarily rendered respondents' regression analysis, and the district court's conclusions based on it, unreliable. See *EEOC* v. *Federal Reserve Bank*, 698 F.2d 633, 645 (4th Cir. 1983), petition for cert. pending *sub. nom. Cooper* v. *Federal Reserve Bank*, No. 83-185. Liability cannot be premised upon the results of a multiple regression analysis that inextricably intertwines the effects of actionable employment decisions with the effects of nonactionable employment decisions. It is not possible to isolate the portion of such results, if any, attributable to decisions on which liability may properly be grounded. The statistical results upon which the trial court relied reflected without differentiation the combined effects of three factors: (1) timely promotion decisions upon which it would be legally permissible to premise liability; (2) untimely promotion decisions upon which it would *not* be legally permissible to premise liability; and (3) timely and untimely initial placement and decisions of others upon which it would *not* be legally permissible to premise petitioners' liability. Based on the evidence relied upon by the trial court, it is not legally or logically possible to determine which, if any, portion of the combined results of these three factors is due to personnel actions upon which liability can be based. Indeed, the district court specifically stated that there was "[n]o

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[12] The grade (*i.e.*, salary) levels of persons entering the federal service are determined in accordance with OPM (formerly CSC) regulations that take account of relevant education and experience. Similarly, OPM regulations limit the extent to which a person's grade level may be increased on a transfer from one agency to another. See generally 5 C.F.R. Pts. 300-351.

practical method of separating the effects of pre-1972 and post-1972 discrimination in regression analysis" (App., *infra*, 48a n.20); but see note 14, *infra*.[13] It was, therefore, improper for the court of appeals to hold without further refinement or analysis that the relevant evidence established an inference of discrimination sufficient to carry respondents' burden of proof. *Wilkins* v. *University of Houston*, 662 F.2d 1156, 1157 (5th Cir. 1981).

Under *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982), a remand is required where the district court findings are rendered unreliable by an erroneous view of the law, such as the district court exhibited here, unless "the record permits only one resolution of the factual issue." See also *United States Postal Service Board of Governors* v. *Aikens*, *supra*. The evidence in this record when evaluated under the correct legal standards regarding the effects of pre-1972 actions and initial placement decisions does not permit the conclusion that the trier of the fact would be required to resolve the issues in respondents' favor. Thus, the state of the record required the court of appeals to remand the case to the district court for further proceedings under proper legal standards. In *Aikens*, this Court ordered remand because "we cannot be certain that [the district court's] findings of fact in favor of the Postal Service were not influenced by its mistaken view of the law" (slip op. 5). In the instant case, the district court's acceptance of respondents' statistics and its rejection of petitioners' statistics are expressly based upon the very legal errors recognized by the court of appeals (pages

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[13] The district court made no finding that promotion decisions alone were discriminatory, because it believed, contrary to the court of appeals' ruling, that petitioners had control over initial placement decisions. Indeed, the district court specifically rejected defendants' extensive statistical evidence, which focused on promotions and showed no adverse treatment of class members, because that evidence did not deal with initial placement. (App., *infra*, 55a n.40, 59a n.47.)

3-6, *supra*). Accordingly, the principle of *Aikens*, *a fortiorari*, requires a remand to the district court here.[14]

The courts below rendered their decisions prior to *Aikens*. The court of appeals' decision cannot stand in light of this Court's direction in *Aikens* that all of the evidence must be evaluated at the conclusion of the case in order to determine whether plaintiffs carried their burden of establishing by a preponderance of the evidence that defendants intentionally discriminated against them. We therefore submit that the court of appeals' decision should be summarily vacated and the case remanded with appropriate directions for further proceedings.[15]

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[14] The respondents' multiple regression analysis could then be rerun using a model that factors out the effects of irrelevant employment decisions (*i.e.*, decisions occurring prior to March 24, 1972, and decisions relating to initial placement at time of hire). This can be easily accomplished with the simple addition of a variable to the respondents' model that accounts for grade or salary as of March 24, 1972, and for grade or salary at initial placement for those placed after March 24, 1972. See Finklestein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 Colum. L. Rev. 737, 745-746 (1980).

While we would not oppose affording respondents a further opportunity for evidentiary development in light of the court of appeals' clarification of the governing legal standards, we submit that, in fairness, the government should also be given the opportunity to submit additional evidence, such as that submitted with our motion for reconsideration. See note 3, *supra*. We submit that such evidence will establish that women at NAVCOSSACT and NARDAC have received as many promotions and advanced as rapidly as similarly situated men at all relevant times.

[15] In light of this submission, we do not urge that the Court grant plenary review in order to consider the two additional questions we have presented. We do not, on balance, believe that these questions present issues requiring plenary consideration at this time. Should the Court set the case for briefing and argument, however, we believe that these additional questions should also be considered, in order to present the case in its full factual and legal context.

The Court recognized in *Hazelwood School District* v. *United States*, 433 U.S. 299, 308 (1977), that when special qualifications are required to fill the jobs at issue, the relevant statistical comparisons must be among those who possess these qualifications. Here, respondents' regression analysis failed to account for such qualifications, since it did not factor in computer-related experience as an independent variable. The court below concluded (App., *infra*, 14a) that the independent variable of length of employment with NAVCOSSACT/NARDAC was a valid proxy for such experience. That conclusion overlooks the fact that the grade level at which a class member is initially placed when joining NAVCOSSACT/NARDAC reflects her *computer-related* experience before coming to the agency. All respondents' independent variables relevant to that initial placement (education, length of government service and, essentially, age) ignore that experience. The class members had significantly less computer-related experience; that relative lack of experience was not adequately reflected in respondents' regression analysis.

The court of appeals followed its prior practice in imposing a heightened burden of proof on the employer at the remedial stage of Title VII litigation. It held that after a class member shows she has been adversely affected, the employer must rebut the presumption of discrimination by "clear and convincing evidence" establishing a legitimate business reason for the adverse action. App., *infra*, 21a-22a; *McKenzie* v. *Sawyer*, 684 F.2d 62, 78 (D.C. Cir. 1982). This ruling is consistent with the practice in the Seventh and Fifth Circuits (*Stewart* v. *General Motors Corp.*, 542 F.2d 445, 453 (7th Cir. 1976), cert. denied, 433 U.S. 919 (1977); *Lee* v. *Washington County Board of Education*, 625 F.2d 1235, 1239 (5th Cir. 1980)), but it conflicts with the practice in the Fourth Circuit, where the employer may justify his actions by a simple preponderence of the evidence. *Sledge* v. *J. P. Stevens*, 585 F.2d 625, 637 (1978), cert. denied, 440 U.S. 981 (1979); *EEOC* v. *American National Bank*, 652 F.2d 1176, 1201 (4th Cir. 1981). Petitioners are defendants placed in the unusual posture of having the burden of proof shifted to them at the remedial stage. The shift of the burden is, we submit, clearly adequate to protect the interests served by Title VII under the ordinary "preponderance of the evidence" standard. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 362 (1977); *California* v. *Mitchell Brothers' Santa Ana Theater*, 454 U.S. 90, 93 (1981); *Herman & MacLean* v. *Huddleston*, Nos. 81-680 & 81-1076 (Jan. 24, 1983).

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further consideration in light of *United States Postal Service Board of Governors* v. *Aikens*, *supra*.

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OCTOBER 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2370

YVONNE G. TROUT, ET AL.

v.

JOHN F. LEHMAN, JR., SECRETARY OF THE NAVY, ET AL.,
APPELLANTS

No. 81-2373

MARIE LOUIS E. BACH, ET AL.

v.

JOHN F. LEHMAN, JR., SECRETARY OF THE NAVY, ET AL.,
APPELLANTS

[See draft, attached, for No. 82-1304.]
No. 82-1305

YVONNE G. TROUT, ET AL.

v.

JOHN F. LEHMAN, JR., SECRETARY OF THE NAVY, ET AL.,
APPELLANTS

Appeals from the United States District Court
for the District of Columbia
(D.C. Civil Actions Nos. 73-55 & 76-1206

Argued November 19, 1982
Decided March 11, 1983

Before MACKINNON and EDWARDS, *Circuit Judges*, and SWYGERT, * *Senior Circuit Judge*, United States Court of Appeals for the Seventh Circuit.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

Separate opinion by MACKINNON, *Circuit Judge*, dissenting in part and concurring in part.

EDWARDS, *Circuit Judge*: These appeals arise out of District Judge Harold H. Greene's rulings against the Department of the Navy ("Navy"), an operational unit within the Navy, and certain named officials in four consolidated Title VII[1] sex discrimination cases on the questions of liability,[2] relief,[3] and reconsideration.[4] We are asked to review the District Court's conclusion that the appellants discriminated against a class of female professional technical employees in initial grade placements and promotions. We are also requested to review the District Court's ruling that, once an individual class member shows in a remedial hearing that she was a potential victim of the proven discrimination, the burden shifts to the employer to demonstrate by clear and convincing evidence that its employment decisions with regard to that individual were based on legitimate factors unrelated to the policy of discrimination that has already been proved. Finally, the appellants challenge the District Court's findings of discrimination against two individual employees and the relief ordered for those individuals.

In pursuing these appeals, the appellants have raised an issue concerning the sufficiency of the prima facie case presented by the class plaintiffs. On the record at hand, we believe that the appellants' objections on this score arise from

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*Sitting by designation pursuant to 28 U.S.C. § 294(d) (Supp. V 1981).

[1] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. IV 1980).

[2] *Trout v. Hidalgo*, 517 F. Supp. 873 (D.D.C. 1981).

[3] *Trout v. Hidalgo*, Civ. No. 73-55 (D.D.C. Oct. 20, 1981), *reprinted in* I Joint Appendix ("Jt. App.") 16.

[4] *Trout v. Lehman*, Civ. No. 73-55 (D.D.C. Mar. 10, 1982) *reprinted in* I Jt. App. 28.

too stringent a view of the requisites of a prima facie case. "The burden of establishing a prima facie case of disparate treatment," the Supreme Court has emphasized, "is not onerous." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). On the basis of the evidence of discrimination introduced at trial, Judge Greene properly held that the class plaintiffs had satisfied this burden; the Navy's objections to the plaintiffs' statistical presentation were speculative and unquantified, and the court's decision to disregard those challenges was neither clearly erroneous nor contrary to established legal principles.[5] We hold, however, that evidence introduced at trial effectively rebutted the inference that the defendants had discriminated in initial grade placements, and we reverse that aspect of the District Court's judgment of class-wide liability.

The remaining issues raised in these appeals are less difficult to resolve. As the appellants appeared to concede in the oral argument before this court, the District Court's application of the clear and convincing evidence standard in individual relief hearings is consistent with the law of this circuit. The District Court's findings of discrimination against two individual employees, moreover, rest largely on its evaluation of the design, motive, and intent with which the appellants acted; while "it would be our duty to correct clear error," *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949), the trial court's choice between two permissible views of the weight and direction of the evidence was not clearly erroneous. Nevertheless, we are unable to determine whether the District Court acted within its authority in fashioning relief for these individuals, and we remand several elements of the relief award for further consideration.

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[5] Although a more thorough analysis of the evidence offered by the appellants in support of their motion for reconsideration might have led the trial court to conclude that the prima facie case had been rebutted—a proposition about which we will not speculate since the appellants' evidence was not subjected to the rigors of the adversarial process—we find no basis for overturning the court's discretionary refusal to retry the case many months after rendering its decision.

I. BACKGROUND

A. *Factual Background*

The appellants in these cases are officials of the Navy and an agency of the Navy formerly referred to as the Naval Command Support Activity and now known as the Navy Regional Data Automation Center ("NAVCOSSACT/NARDAC"). NAVCOSSACT was originally established as the center of Navy computer operations for national defense purposes; in 1977, NAVCOSSACT was dissolved and its personnel and resources were combined with those of several other agencies to form NARDAC, which develops computer systems and documents for computer systems, delivers the systems and documents to user organizations, and trains personnel in their operation. The appellees are employees or former employees of NAVCOSSACT/NARDAC, some of whom are members the class of "all female professional technical employees employed by ... [NAVCOSSACT] or ... [NARDAC] at any time between June 6, 1972, and June 4, 1979."[6]

The genesis of this protracted litigation, the annals of which fill many volumes and the resolution of which already has consumed a large chunk of judicial resources, can be traced to June 21, 1972. It was then that Yvonne Trout, a NAVCOSSACT computer systems analyst, filed an informal charge of sex discrimination on behalf of herself and a class of female NAVCOSSACT employees. This charge, the relevant portion of which alleged "[t]he existence of a continuing and pervasive pattern of discrimination against women which results in their being deprived of consideration for and promotion to upper grade levels and management positions," II Jt. App. 632-33, was made part of a formal complaint filed by Trout on September 20, 1972. Shortly thereafter, on January 10, 1973, Trout filed a civil action in the District Court alleging, in part, "a continuing and pervasive pattern of discrimination with respect to all

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[6] *Trout v. Middendorf*, Civ. No. 73-55 (D.D.C. June 18, 1979) (order limiting class definition), Record ("R.") 115; *see Trout v. Hidalgo*, 517 F. Supp. 873, 877 (D.D.C. 1981).

professionaal technical female applicants and employees." Complaint ¶ 63, R.1.

For purposes of this appeal, the extensive procedural history of Trout's civil action may be summarized quickly. In April 1973, Clara Perlingiero, another NAVCOSSACT computer systems analyst who had filed informal charges of sex discrimination in September 1971 and August 1972 and a formal administrative complaint in September 1972, was allowed to join as a party plaintiff. Immediately thereafter, the District Court conditionally certified a class consisting of "all past, present and future female professional technical employees of ... [NAVCOSSACT]." *Trout v. Warner*, Civ. No. 73-55 (D.D.C. Apr. 6, 1973) (order authorizing class action), R.16. In 1976, two additional cases involving sex discrimination were filed by NAVCOSSACT employees and consolidated with Trout's case; one of these suits alleged discrimination against Marie Bach, a security manager and nonmember of the conditionally certified class. An independent action filed by Trout was also consolidated with her original case in 1978. The conditionally certified class was redefined in June 1979, *see* text at note 6 *supra*, and a ten-day trial of the consolidated actions was conducted in June 1980.

B. *The District Court's Decisions*

1. *Class Claims*

As the District Court recognized, "[t]he class action aspects of this lawsuit involve an alleged pattern and practice of sex discrimination in [NAVCOSSACT/NARDAC's] hiring, performance evaluation, job assignment, promotion, and award procedures." *Trout v. Hidalgo*, 517 F. Supp. 873, 877 (D.D.C. 1981). Hiring and initial job placement procedures, however, were the subject of only a small fraction of the trial testimony and exhibits. The meager evidence adduced regarding the determination of initial grade levels for new NAVCOSSACT/NARDAC employees uniformly supported the defendants' contention that they were not responsible for initial placement decisions. The plaintiffs, in fact, made no effort whatsoever to rebut the defendants' evidence attributing sole responsibility for initial

placement decisions to the Civil Service Commission ("CSC") and the Office of Personnel Management ("OPM"). Notwithstanding this deficiency in the plaintiffs' proof with respect to initial placements, the District Court held, on the basis of extensive statistical evidence and the testimony of a number of present and former NAVCOSSACT/NARDAC employees, that the class plaintiffs had established a prima facie case of sex discrimination in both initial placements and promotions, and that the defendants had failed to rebut that showing.

These conclusions rested primarily, but not exclusively,[7] on the District Court's assessment of the probative value of the competing statistical studies presented by the parties. The plaintiff's expert, whose techniques and findings were ultimately accepted by the court, began his analysis with the undisputed salary differentials between men and women at NAVCOSSACT/NARDAC, reflecting a relative concentration of women in lower-level positions. His study was designed to determine whether these differentials could be explained by differences between men and women in educational attainment and experience. Using data from NAVCOSSACT/NARDAC personnel records, he specified a model in which the dependent variable was salary and the independent variables were (1) level of education, (2) years of NAVCOSSACT/NARDAC experience, (3) years of other governmental experience, (4) years of potential nongovernmental experience between the date of receipt of last educational degree and date of entry into the federal service, and (5) sex. Factors (1) through (4) proved insufficient to explain the salary differentials. Even when differences in education and experience were taken into account, female employees continued to receive substantially lower salaries than men. Indeed, "[t]hese differences in salaries were statistically significant at the .01 level, that is, they would be

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[7] The District Court also found persuasive the testimony of a number of class members. Although we do not specifically discuss this testimony, the District Court properly considered the statistical and nonstatistical evidence on a cumulative basis in assessing the strength of the plaintiffs' prima facie case. *EEOC v. American Nat'l Bank, 652 F.2d 1176, 1188-89 (4th Cir. 1981), cert. denied*, 103 S. Ct. 235 (1982).

expected to arise by chance less than one percent of the time if there were no discrimination based on sex." *Trout*, 517 F. Supp. at 879 n.14. An additional regression confined to employees hired after 1972, the effective date of Title VII in the federal service, yielded results consistent with the basic model.

The defendants responded to this statistical showing of discrimination in two ways. First, they argued that the plaintiffs' statistics were insufficiently refined to support a prima facie case because (1) the regressions omitted critical variables concerning the minimum objective qualifications required for promotions within NAVCOSSACT/NARDAC, (2) the regression results were biased by the expert's failure to eliminate the effects of nonactionable pre-1972 discrimination, and (3) the inclusion of the effects of discrimination by agencies other than NAVCOSSACT/NARDAC skewed the regression results. The view of the requisites of a prima facie case embodied in these objections was rejected by the trial judge, who apparently believed that while otherwise valid studies incorporating these factors could be used to rebut a prima facie case, the plaintiffs' statistical evidence was sufficiently accurate to give rise to an inference of actionable discrimination. Such studies did constitute the second prong of the defendants' response to the plaintiffs' case, but the District Court concluded that the statistical analyses proffered by the defendants suffered from a number of defects that rendered them less persuasive than the plaintiffs' exhibits.

Following the trial of the plaintiffs' liability claims, and after holding the defendants liable for discrimination against the class of female professional technical employees at NAVCOSSACT/NARDAC, the District Court directed the parties to submit memoranda on potential methods of determining individual employees' entitlement to relief. Taking liberties with this instruction, the defendants presented a number of new statistical studies on the question of class liability and substantial documentary evidence pertaining to their responsibility for initial grade placement decisions. These data later formed the basis for a motion for reconsideration, which the trial court characterized as

"more akin to a demand for a new trial than for reconsideration."[8] The basic thrust of this motion was that the defendants, in preparing for the relief proceedings, had collected new evidence that required the court to enter judgment for them on the question of liability. In the court's view, however, this motion was untimely and provided no basis for either reconsideration or a new trial. The court reasoned that the defendants had had ample time to prepare their case, the evidence was not of a sort that would have been unavailable to a duly diligent defendant at the time of the trial, the new studies were cumulative and unlikely to affect the result, and the resolution of the entire matter would not be advanced by another trial on the question of liability.

If the District Court's rulings on class liability are affirmed, this lawsuit must enter a second phase, in which class members' entitlement to relief will be determined on an individual basis. *See, e.g., International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 360-62 (1977). On this point, the District Court held that, after an employee demonstrates in remedial hearings that she was a potential victim of the proven discrimination, "the burden shifts to the employer to demonstrate by clear and convincing evidence that its employment decisions with regard to that individual were based on legitimate factors unrelated to the policy of discrimination which has already been proved."[9] This placement of the burden of persuasion provides a second ground for challenging the District Court's resolution of the class action aspects of this suit.

2. *Individual Claims*

In addition to resolving the issue of class liability, the District Court considered five individuals' allegations of sex discrimination and ruled in favor of two of the employees. It found, first, that Marie Bach, a nonmember of the class,

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[8] *Trout v. Lehman*, Civ. No. 73-55, mem. op. at 2 (D.D.C. Mar. 10, 1982), *reprinted in* I Jt. App. 28, 29.

[9] *Trout v. Hidalgo*, Civ. No. 73-55, mem. op. at 4 (D.D.C. Oct. 20, 1981), *reprinted in* I Jt. App. 16, 19.

had been removed from her position as a GS-13 security manager in 1976 and 1979, replaced by younger males with grades of GS-14 and GS-15, and subjected to other discriminatory acts, including the failure to classify her position at a grade comparable to that of other Navy security specialists with similar functions. Among the relief awarded Bach were two retroactive promotions and commensurate backpay. The court also found that Clara Perlingiero, a class member, had been discriminatorily denied promotions in 1971 and 1979 and subjected to other discriminatory acts, including the failure to classify her position at a grade comparable to similarly situated males. Among the relief awarded Perlingiero were retroactive promotions to GS-13 as of September 1971 and to GS-14 as of September 1979 and commensurate backpay. Both the findings of liability and the awards of relief have been challenged in these appeals.

II. Discussion

A. *The Scope of Review*

In reviewing the challenged decisions, we are guided by the principle that "factfinding is the basic responsibility of district courts, rather than appellate courts," *DeMarco v. United States*, 415 U.S. 449, 450 n.* (1974) (per curiam), and the rule that a district court's factual findings may not be set aside unless clearly erroneous, *Pullman-Standard v. Swint*, 102 S. Ct. 1781, 1789 (1982); Fed. R. Civ. P. 52(a). This rule, of course, does not apply to conclusions of law, *Pullman-Standard*, 102 S. Ct. at 1789, or to factual findings that result from the application of incorrect legal principles, *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 102 S. Ct. 2182, 2189 n.15 (1982). But most findings of fact, including findings of discriminatory intent, will be left undisturbed unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

Although many of the issues raised in these appeals involve purely factual conclusions of the District Court, several present legal questions or mixed questions of law and

fact. The trial court's findings of discrimination against Bach and Perlingiero and its assessment of the relative probative force of the parties' statistical evidence, for example, are undoubtedly factual. *See Pullman-Standard*, 102 S. Ct. at 1790-91; *Medina v. Reinhardt*, 686 F.2d 997, 1007 (D.C. Cir. 1982). But the appellants' challenges to the sufficiency of the prima facie case of discrimination against the class of female professional technical employees at NAVCOSSACT/NARDAC, grounded as they are in the alleged omission from the statistical showing of factors reflecting important legal principles, raise legal issues that trigger a more careful examination by this court.

B. *The Prima Facie Case*

To establish a prima facie case of sex discrimination in initial grade placements or promotions, plaintiffs are required to show only that it is more likely than not that their employers failed properly to place or promote women because of discriminatory intent. *See Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576 (1978); *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864, 866 (9th Cir. 1982). This burden is not a heavy one, *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 253, and the required showing may be made by statistics alone, *Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977), or by a "cumulation of evidence, including statistics, patterns, practices, general policies, or specific instances of discrimination," *EEOC v. American National Bank*, 652 F.2d 1176, 1188 (4th Cir. 1981), *cert. denied*, 103 S. Ct. 235 (1982).

If the plaintiffs have used statistics to make out a prima facie case, the defendants may rebut the inference of discrimination by presenting a legitimate, nondiscriminatory explanation for the observed statistical disparity or by raising a genuine issue of material fact concerning the accuracy of the picture painted by the plaintiffs' statistics. *See International Brotherhood of Teamsters v. United States*, 431 U.S. at 360; *Croker v. Boeing Co. (Vertol Division)*, 662 F.2d 975, 991 (3d Cir. 1981) (en banc). To prevent the latter course from becoming an incomprehensible battle of the experts, several general principles should guide a court's as-

sessment of the sufficiency of the plaintiffs' prima facie case. The most important of these principles is that, while plaintiffs must demonstrate to the court's satisfaction that their statistical comparisons are meaningful, they need not present a perfect statistical analysis at the prima facie case stage. *See Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977); *Medina v. Reinhardt*, 686 F.2d at 1008-09; *Vuyanich v. Republic National Bank*, 505 F. Supp. 224, 306-07, 354-57 (N.D. Tex. 1980).

The appropriate degree of refinement of the plaintiffs' statistical analysis, moreover, may depend on the quality and control of the available data. *See Vuyanich*, 505 F. Supp. at 356. If the plaintiffs account for the effects of extraneous variables to the extent reasonably permitted by the available data and the evidence presented strongly supports an inference of discriminatory treatment, the District Court properly may conclude that the plaintiffs have made out a prima facie case. As noted in *Detroit Police Officers' Association v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), a court should not "require proof to a mathematical certainty, . . . [because] there is no such requirement [under Title VII]. Deficiencies in the data base 'may, of course, detract from the value of [statistical] evidence,' but ordinarily would not obliterate its evidentiary value." *Id.* at 687 (citations omitted) (quoting *Teamsters*, 431 U.S. at 340 n.20). This is particularly true where, as here, the defendants controlled the only sources of data on which statistical analyses could be based. As the District Court observed, "plaintiffs cannot legitimately be faulted for gaps in their statistical analysis when the information necessary to close those gaps was possessed only by defendants and was not furnished either to plaintiffs or to the Court." *Trout*, 517 F. Supp. at 883 (footnote omitted).

Furthermore, the most effective way to rebut a statistically based prima facie case is to present more accurate statistics. As the Supreme Court has made clear, where "the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence on his own." *Dothard*, 433 U.S. at 331. But unquantified, speculative, and theoretical objections to the

proffered statistics are properly given little weight by the trial court:

> When a plaintiff submits accurate statistical data, and a defendant alleges that relevant variables are excluded, defendant may not rely on hypothesis to lessen the probative value of plaintiff's statistical proof. Rather, defendant ... must either rework plaintiff's statistics incorporating the omitted factors or present other proof undermining plaintiff's claims.

Segar v. Civiletti, 508 F. Supp. 690, 712 (D.D.C. 1981). Although NAVCOSSACT/NARDAC did present some studies of its own—ultimately rejected by the District Court—tending to undermine the plaintiffs' claims, it did not, for the most part, attempt to correct the *alleged* deficiencies in the plaintiffs' statistical presentation in its trial testimony or exhibits. *See* IV Jt. App. 1921-23. For this and other reasons—set forth below—these *alleged* shortcomings neither prevented the plaintiffs from establishing a prima facie case nor constituted a persuasive rebuttal to an otherwise adequate initial showing.

1. *Minimum Objective Qualifications*

The appellants' principal objection to the statistical analyses on which the District Court relied appears to be that the statistics ignored the minimum objective qualifications necessary for placement and promotion in the professional technical job series at issue. In *Davis v. Califano*, 613 F.2d 957 (D.C. Cir. 1979), this court suggested that "the *minimum objective qualifications* necessary for one to be eligible for promotion must be considered in the statistical data presented initially by a plaintiff." *Id.* at 964 (emphasis in original). The *Davis* court also speculated that "if a particular number of years of work experience were established as a minimum job criterion, then that would need to be reflected in the proffered statistics." *Id.* At least part of the *Davis* court's rumination became the law of this circuit in *Valentino v. United States Postal Service*, 674 F.2d 56 (D.C. Cir. 1982), in which we affirmed a ruling that members of a class consisting of a wide variety of occupational categories had failed to make out a prima facie case of sex

discrimination. "'When special qualifications are required to fill particular jobs,'" the court declared, "proof that does not center on those 'who possess the necessary qualifications' falls short." *Id.* at 67-68 (quoting *Hazelwood School District v. United States*, 433 U.S. at 308 n.13).[10]

Relying on these cases, the appellants claim that placements and promotions within the NAVCOSSACT/NARDAC work force rest on minimum objective qualifications established by the OPM. These qualifications, they argue, can be summarized in terms of years of computer-related experience; as a result, any analysis of initial placements and promotions above the GS-5 level must include the amount of computer-related experience possessed by the employees. Because the appellants contend that the plaintiffs' statistics did not account for such experience, they conclude that the regressions could not establish a prima facie case. We reject this line of argument for two principal and related reasons: first, we find that the plaintiffs' statistical analyses did account for minimum objective qualifications; and second, contrary to the appellants' assertions, we find the conclusions reached by the District Court in this case to be consistent with the principles enunciated in *Valentino*.

Not only did the *Valentino* court implicitly approve the results reached by the District Court in this case, *see id.* at 68, 70, but the reasoning underlying its decision is wholly inapplicable in a case, like this one, where all members of the class are professional technical employees with generally similar job skills. The regression analyses under consideration in *Valentino*, like the studies presented in this case, attempted to estimate the effect of sex, years of education, and length of governmental service on employee's salaries. But that case, unlike this one, involved a class composed of individuals in numerous occupational catego-

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[10] *Valentino's* holding is limited, we believe, by the fact that the plaintiffs' expert there had failed to submit qualification data that were available. *Id.* at 71 n.23. If data on a particular minimum objective qualification are simply unavailable, *Valentino's* requirement may be eased, for "[e]xactness is not required at the *prima facie* stage." *Medina v. Reinhardt*, 686 F.2d at 1008-09 & n.6.

ries with readily distinguishable qualifications whose experts had "utterly failed to control for type of education and job classification." *Id.* at 70. The "grossly imprecise" comparisons that resulted, *Medina v. Reinhardt*, 686 F.2d at 1010, simply could not provide a reasonable basis for inferring disparate treatment. It would, it seems clear, truly have been "irrational to assume 'equal qualifications' to fill engineering or secretarial vacancies among persons educated the same number of years and employed by the government for the same length of time." *Valentino*, 674 F.2d at 71 (footnotes omitted).

So understood, the result in *Valentino* turns on the inadequacy of the proxies—years of education and government experience—for the myriad minimum objective qualifications of the diverse positions held by class members. No such problem is present here. The class certified by the District Court consists solely of employees performing computer-related tasks, and the only minimum objective qualification identified by the appellants is one-to-three years of computer-related experience. Far from being "grossly imprecise," the plaintiffs' proxy for this qualification—years of experience with NAVCOSSACT/NARDAC—provides a perfectly adequate basis for inferring disparate treatment. As the appellants observe, this proxy arguably does equate time spent in a clerical position with time spent in the computer field and could thus penalize them for moving female employees from lower-level, nonprofessional jobs into technical professional computer positions with higher potential salaries. Brief for Appellants at 44 & n.21. But the record does not suggest that such movement occurred with *any* regularity, *see* IV Jt. App. 1860-61, much less with sufficient frequency to cast doubt upon the inference of discrimination arising from the plaintiffs' statistical showing.[11]

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[11] The appellants also argue that the plaintiffs' statistics overstate the qualifications of women in ways that, while not related to the minimum objective qualifications for NAVCOSSACT/NARDAC positions, exaggerate the expected salaries of female employees and reduce the explanatory power of the plaintiffs' model. They contend, for example, that the plaintiffs' failure to account for type of education biased their

2. *Relevant Time Frame*

The appellants also argue that the plaintiffs' statistics failed to make out a prima facie case because they ignored the time limitations embodied in Title VII. Absent a valid claim of continuing violation, *see, e.g., McKenzie v. Sawyer*, 684 F.2d 62, 72 (D.C. Cir 1982), *Milton v. Weinberger*, 645 F.2d 1070, 1074-77 (D.C. Cir. 1981), Title VII does not apply retroactively to discrimination against federal employees that occurred prior to March 24, 1972, unless a complaint was pending on its effective date. *Stoller v. Marsh*, 682 F.2d 971, 974 (D.C. Cir. 1982); *Thompson v. Sawyer*, 678 F.2d 257, 289 (D.C. Cir. 1982); *Brown v. Turner*, 659 F.2d 1199, 1201-02 (D.C. Cir. 1981). In this case, the administrative complaint on which the class allegations rest was not filed until June 21, 1972. Under the Civil Service Regulations in effect at that time, all claims originating more than fifteen days prior to that complaint are time-barred. 5 C.F.R. § 713.214(a) (1) (i) (1972) (currently codified at 29 C.F.R. § 1613.214(a) (1) (i) (1982)); *see Milton*, 645 F.2d at 1072 & n.6. Although the District Court recognized these fundamental principles, the appellants believe that it erred in refusing to apply them when analyzing the plaintiffs' statistical evidence.

The District Court concluded that plaintiffs need not factor out time-barred discrimination because defendants may be held liable for the continuing effects of that discrimination. This theory was once in vogue, but it is flatly inconsistent with the Supreme Court's pronouncements in

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statistics because most computer science degrees are earned by men, and that the plaintiffs' nongovernmental experience proxy biased their statistics because women, on the average, spend more time out of the labor force than do men. Because the testimony offered at trial did not quantify these objections or show that such differences existed in the population of NAVCOSSACT/NARDAC employees, the District Court could, at most, speculate that the omissions might have had some effect on the statistical showing. *See, e.g.*, II Jt. App. 758-60; IV Jt. App. 1880-85. Such speculation, based on evidence not "keyed to the population here involved," *Trout*, 517 F. Supp. at 881, would do little to undermine the plaintiffs' prima facie case. *See Vuyanich v. Republic Nat'l Bank*, 505 F. Supp. at 307.

Hazelwood School District v. United States, 433 U.S. at 309-10, and *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977). As noted above, however, we believe that the District Court's conclusion that the plaintiffs' statistics were capable of establishing a prima facie case was correct, albeit in part for the wrong reason, and should thus be affirmed. *See Helvering v. Gowran*, 302 U.S. 238, 245 (1937); *Eikenberry v. Callahan*, 653 F.2d 632, 636 (D.C. Cir. 1981).

By grouping nonactionable *hiring* decisions with those for which NAVCOSSACT/NARDAC could properly be held liable, certain of the plaintiffs' statistical analyses hold the potential for some distortion concerning the adverse impact of the appellants' post-1972 promotion policies. However, it is clear that the plaintiffs did not rely solely on data regarding nonactionable hiring decisions; indeed, there is no doubt whatsoever that the plaintiffs' statistical analyses included a substantial amount of data concerning post-1972 employment decisions affecting class members. For these reasons, we do not believe that "failure to factor out time-barred discrimination discredited the analyses. Statistics tuned to the proper time period are more probative than statistics not so tuned, but categorical rejection of the latter is not warranted." *Valentino v. United States Postal Service*, 674 F.2d at 71 n.26. The approach to statistics adopted by the Supreme Court in *Hazelwood*, 433 U.S. at 309-10, and *International Brotherhood of Teamsters v. United States*, 431 U.S. at 360, plainly suggests that statistics including time-barred decisions are "sufficient to support a prima facie case and shift the burden to the defendant to show that its actions during the relevant period rebut the inference of discrimination raised by the plaintiff's broad summary." *Movement for Opportunity & Equality v. General Motors Corp.*, 622 F.2d 1235, 1258 (7th Cir. 1980).[12]

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[12] *See EEOC v. American Nat'l Bank*, 652 F.2d at 1188, 1194-95; B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 326-27 (Supp. 1979). *But see EEOC v. United Va. Bank/Seaboard Nat'l*, 615 F.2d 147, 150-51 (4th Cir. 1980.)

Although the appellants did attempt to make such a showing, the trial court found their statistical evidence defective on other grounds. We can find no basis upon which to overturn Judge Greene's findings on this point. Therefore, we agree that the appellants' evidence was incapable of raising a genuine issue concerning the validity of the inference of discrimination raised by the plaintiffs' statistical presentation. As a result, NAVCOSSACT/NARDAC was left with only an unquantified theoretical objection that could not undermine the prima facie case. *See* II Jt. App. 743-44.

3. *Relevant Employer*

The appellants' final objection to the sufficiency of the prima facie case is that the plaintiffs' statistics attribute to NAVCOSSACT/NARDAC responsibility for the employment decisions of other agencies over which it had no control. Undisputed trial testimony reveals, they claim, that initial grade placements were made by either the CSC or the OPM or by employing agencies that were not made defendants in this case. As we read the record, the District Court's conclusion that NAVCOSSACT/NARDAC ["did"] not make a convincing showing that it had no control over initial grade determinations," *Trout*, 517 F. Supp. at 880, was clearly erroneous. The rebuttal evidence submitted by the defendants at trial was sufficient to raise a genuine issue concerning their responsibility for initial placement decisions, and the plaintiffs made no attempt to counter this evidence. We conclude, therefore, that the Disrict Court erred in holding that the class was entitled to relief for discriminatory *initial placements*.

This does not mean, however, that the plaintiffs' statistics could not make out a legally sufficient prima facie case of discrimination *in promotions*. Because NAVCOSSACT/NARDAC did not quantify the extent to which the disparity between men and women revealed by the plaintiffs' statistics was attributable to the locked-in effects of nonactionable discrimination, *see, e.g.*, IV Jt. App. 1829, the plaintiffs' statistical analyses created a justifiable inference that the defendants had "failed to promote equitably

individuals who were discriminated against at hiring," *Trout*, 517 F. Supp. at 885, or had slowed the progress of women who had initially been properly placed.

C. *The Rebuttal Evidence*

NAVCOSSACT/NARDAC attempted to bolster its objections to the plaintiffs' statistical evidence by introducing several statistical studies of its own at trial and by proffering additional analyses at the relief and reconsideration stages. The District Court, however, found the former studies unpersuasive for a variety of reasons and refused to consider the latter as untimely tendered. The appellants object to both of these decisions.

1. *The Evidence Offered at Trial*

The evidence introduced at trial in opposition to the plaintiffs' statistical studies consisted primarily of a "cohort" analysis (which examined the flow through NAVCOSSACT/NARDAC's promotional system of male and female employees with similar hiring dates who started at the same grade level), a promotion study, and several regression analyses. As we have already observed, the District Court's decision to reject this evidence can be upset only if clearly erroneous. *See Medina v. Reinhardt*, 686 F.2d at 1007; *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 823 (5th Cir.), *cert. denied*, 103 S. Ct. 451 (1982). Although the appellants characterize the reasons underlying Judge Greene's rejection of their studies as unproven speculation, our review of the record has not left us with a "definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. at 395.

As the District Court observed, NAVCOSSACT/NARDAC's regression studies were, for the most part, not introduced into evidence at trial. The defendants relied instead on brief descriptions of the conclusions allegedly supported by studies that were not in evidence. *See, e.g.*, II Jt. App. 761. Judge Greene's decision to assign little weight to these studies, which, in any event, did not correct the specification errors allegedly afflicting the plain-

tiffs' regressions, was totally reasonable. The defendants' promotion analysis, moreover, consisted solely of twenty-three pages of statistics, *see* II Jt. App. 636-41, 719-35, which, as far as we can tell, were never adequately explained at trial. Nothing in the record leads us to believe that the District Court's characterization of this study as less persuasive than the plaintiffs' regressions was clearly erroneous.

The centerpiece of the defendants' rebuttal presentation was their cohort analysis. The experts who peformed this study "divided ... [NAVCOSSACT/NARDAC's] work force into groups by the year in which the employees joined the agency and the GS grade at which they entered" and examined the "promotion experiences of each of these groups or 'cohorts' over time ... to compare the relative progress of men and women." *Trout*, 517 F. Supp. at 884. Having reviewed the record on this point, we cannot say that Judge Greene's ultimate conclusion that the cohort analysis was less persuasive than the plaintiffs' regressions was clearly erroneous. As the defendants' expert conceded in another context, *see* IV Jt. App. 1874, the division of the work force into extremely small segments made it unlikely that this cohort study would detect sex-based disparities. *See Schmid v. Frosch*, 680 F.2d 248, 249-50 & n.4 (D.C. Cir. 1982) (per curiam); *Woodard v. Lehman*, 530 F. Supp. 139, 145 (D.S.C. 1982); *Segar v. Civiletti*, 508 F. Supp. at 698. The District Court could properly conclude, moreover, that the exclusion of a substantial number of employees from the cohort analysis reduced its probative force. And, even though the defendants could not be held liable for discriminatory initial grade placements, *see* Part II.B.3. *supra*, the lack of verification of the critical assumption of proper initial placements substantially reduced the persuasive appeal of the cohort study. *See Trout*, 517 F. Supp. at 885 & n.45; *Segar*, 508 F. Supp. at 698.

2. *The Appellants' Attempt to Retry the Case*

The appellants' objection to the District Court's disposition of their motion for reconsideration is both meritless and outrageous for what it suggests. At some point litiga-

tion must come to an end, even though it is always possible to offer more evidence. Notwithstanding NAVCOSS-ACT/NARDAC's contention that the new evidence might alter the previous finding of class liability, the District Court could properly conclude that the time for rebuttal had come and gone. Although the court had inherent power to reconsider its interlocutory orders concerning class-wide liability, *see Laffey v. Northwest Airlines, Inc.*, 642 F.2d 578, 583-84 (D.C. Cir. 1980), the critical question is whether there was good cause to do so. Absent a convincing showing that the District Court's answer to this question constituted an abuse of discretion, we will not second-guess its decision. *Cf. GAF Corp. v. Transamerica Insurance Co.*, 665 F.2d 364, 370-71 (D.C. Cir. 1981) (discussing Rule 60(b) motion for relief from judgment); *Washington Mobilization Committee v. Jefferson*, 617 F.2d 848, 850 (D.C. Cir. 1980) (discussing Rule 59(a) motion to reopen record).

The facts of this case afford no support for a suggestion that the District Court abused its discretion in refusing to reconsider the question of class-wide liability. As Judge Greene properly concluded, the evidence on which the request for reconsideration was based could have been discovered and presented at trial by a duly diligent defendant. *Cf.* 6A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 59.08[3] (1982) (discussing motion for new trial). The defendants had *over seven years* in which to collect evidence and prepare their case, and they have offered no good reason whatsoever to explain why their statistical analyses were not produced at trial. Even if these analyses might have adequately rebutted the plaintiffs' prima facie case—an issue on which our comments would be wholly gratuitous—the District Court plainly did not abuse its discretion in concluding that it need not conduct another trial on the question of liability.

We would add that we find it extremely troublesome--in light of the long and complex history of this litigation and in light of Judge Greene's patient and thoughtful treatment of the case—that the appellants would even propose that the trial court reopen and retry the matter. In the context of this case setting, such an adversarial tactic is irresponsible,

insensitive to the extraordinary burdens faced by district courts already overloaded with heavy dockets, and wasteful of precious resources of litigants and the judiciary. Viewed in this posture, we consider the appellants' request for reconsideration an affront to the judicial system.

D. *The Clear and Convincing Evidence Standard*

Once a class has established liability in a disparate treatment case, "a discrete remedy phase begins. Any individual class claimant may raise a presumption that he is entitled to relief upon a prima facie showing of class membership. The burden of proof then shifts to the employer to rebut that presumption in each individual case." *Milton v. Weinberger*, No. 81-2200, slip op. at 8 (D.C. Cir. Oct. 26, 1982) (as modified, Dec. 20, 1982). This burden, the District Court held, is quite substantial: After an individual employee lists the assignments or opportunities denied her or describes other ways in which she was victimized, an employer must rebut the presumption of discrimination with "clear and convincing evidence." *See Stewart v. General Motor Corp.*, 542 F.2d 445, 453 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977); *Baxter v. Savannah Sugar Refining Corp.*, 495 F.2d 437, 444-45 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974).

Relying on *International Brotherhood of Teamsters v. United States*, 431 U.S. at 360-62, and *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 254-56, the appellants argue that the effect of a finding of class-wide discrimination is identical to the effect of a prima facie case in an individual suit. They claim, therefore, that they can defeat individual class members' entitlement to relief merely by advancing legitimate, nondiscriminatory reasons for their employment decisions. As the appellants appeared to recognize in the oral argument before this court, however, their precise claim was recently considered and rejected in *McKenzie v. Sawyer*, 684 F.2d at 76-78. We held in *McKenzie* that the situation of an individual class member after a showing of class-wide liability "is not analogous to the situation of an individual plaintiff who has made out a prima facie case of disparate treatment." *Id.* at 77. Because

such class members are presumptively entitled to relief upon showing that they were potential victims of the defendants' discriminatory practices, *Teamsters*, 431 U.S. at 362, the defendants must "rebut the plaintiffs' individual showings by clear and convincing evidence." *McKenzie*, 684 F.2d at 78. *Cf. Day v. Mathews*, 530 F.2d 1083, 1085-86 (D.C. Cir. 1976) (per curiam) (individual case).

E. *The Individual Claims*

The appellants' final challenges to the District Court's decisions concern its findings of discrimination against two individual plaintiffs, Marie Bach and Clara Perlingiero, and the relief awarded to those individuals. We have found no basis for challenging the District Court's conclusion that appellee Bach was relieved of her responsibility for automatic data processing security in March 1976 and May 1978 for discriminatory reasons. When tested against the clearly erroneous standard, the court's conclusions that questions concerning her technical background were not the predominant reason for the personnel actions and that the reasons given were mere pretext for discrimination are impregnable.

When her responsibilities were removed, Bach was a GS-13 security specialist; the duties that she had preformed were transferred to males at the GS-14 and GS-15 levels in 1976 and to males at the GS-15 level in 1978. Apparently for this reason, the District Court ordered her retroactively promoted to GS-14 as of March 1976 and to GS-15 as of May 1978. We agree with the District Court that these reassignments could constitute evidence that the defendants had failed appropriately to classify Bach's position. *Trout v. Hidalgo*, No. 73-55, mem. op. at 10 n.12 (D.D.C. Oct. 20, 1981), *reprinted in* I Jt. App. 16, 25. We believe, however, that further consideration of the propriety of the retroactive promotions is necessary because it is not clear that Bach was ever denied a promotion to GS-14 or GS-15 and the males who assumed her duties may have had additional responsibilities that justified their higher classifications.

We have found no basis for upsetting the District Court's conclusions that "the various actions taken against

[Perlingiero] were based on sex discrimination and on retaliation, as distinguished from objective efficiency-related factors," *Trout*, 517 F. Supp. at 891, and that she should be awarded a retroactive promotion to GS-14. The promotion to GS-13 made effective September 1, 1971 poses a more troubling question. This award was improper, the appellants argue, because Perlingiero had no administrative complaint pending on March 24, 1972, the effective date of Title VII. Although the record suggests that Perlingiero may have withdrawn a complaint filed on September 1, 1971 in response to promises that her grievance would be remedied, the District Court made no finding to that effect, and we are thus unable to discern the rationale underlying its retroactive promotion to GS-13.

III. Conclusion

For the reasons set forth above, we affirm in part, reverse in part, and vacate and remand in part. The District Court's findings of class-wide discrimination in promotions and discrimination against Bach and Perlingiero are affirmed, as is its decision imposing the clear and convincing standard of proof in individual relief hearings. The court's imposition of liability for discrimination in initial grade placements is reversed, and its awards of retroactive promotions to GS-14 and GS-15 and commensurate backpay to Bach and a retroactive promotion to GS-13 and commensurate backpay to Perlingiero are vacated and remanded. All other elements of the individual relief are affirmed.

So Ordered.

MACKINNON, *Circuit Judge* (dissenting in part and concurring in part).

I. STANDARD OF REVIEW

Claiming to differentiate between this court's review of "findings of fact" and "conclusions of law," the opinion for the court unnecessarily restricts its scrutiny of the trial court's decision. [Op. at 11] Denominating the trial court's findings of discrimination in the individual claims as primarily "factual," the court's opinion essentially declines to review these judgments.

Categorizing determinations by the district court as "factual" or "legal" in the context of an employment discrimination class action is not as simple as the court's opinion suggests. Other courts have recognized the appropriate standard of review in such cases and their decisions, not recognized by the court, in my opinion provide a more reasonable guide to the appropriate review in these cases.

The Seventh Circuit, has acknowledged that

> [t]he statement that discrimination exists for the purposes of establishing liability under Title VII ... is as much a conclusion of law as a finding of fact. A distinction must be drawn between subsidiary facts to which the "clearly erroneous" standard applies, and the ultimate fact of discrimination necessary to trigger a statutory ... violation....

United States v. City of Chicago, 529 F.2d 415, 425 (7th Cir. 1977). In line with this pronouncement the court continued to an "independent examination" to determine whether the alleged "employment practices as a matter of law, were proscribed under Title VII...." *Id.* See also, *Detroit Police Officers' Association v. Young*, 608 F.2d 671, 686 (6th Cir. 1979).

Categorizing determinations by the district court as "factual" and thereby insulating them from meaningful review can be highly improper. The review employed in this dissent is distinguishable from that employed in the opinion for the court in two critical respects. First, while accepting the district court's factual determinations, I have reviewed

the district court's application of the relevant *legal standards of proof*. Second, I have reviewed the district court's findings of fact in support of its judgment to be certain that these findings have an evidentiary basis in the record. Therefore, this analysis is premised upon a somewhat different standard of review then that employed in the opinion for the court, *supra*.

II. Class Claims

A. *Liability for Initial Placement and Hiring*

Plaintiffs alleged that defendant engaged in a pattern or practice of discrimination against the class of women in numerous respects—"hiring, performance evaluation, job assignment, promotion and award procedures." The trial court found the defendant liable for discrimination in *hiring and/or initial placement, as well as promotion*. The district court's judgment with respect to liability for hiring and/or initial placement should be vacated and remanded for dismissal, however, because these claims of the class were *not* properly before the court. Neither of the class representatives (Trout and Perlingiero) had standing to claim that *they* were discriminated against with respect to initial hiring and/or placement. Both of these women were hired well before the effective date of Title VII;[1] neither named plaintiff ever administratively challenged her hiring or initial placement;[2] and neither alleged in her complaint that *she* was discriminated against with respect to hiring or initial placement. Consequently, these named plaintiffs cannot represent a class challenging the defendant's hiring or initial placement practices; they do not share an injury with the class they purport to represent. "To have standing to sue as a class representative it is essential that a plaintiff must be a part of that class, that is, he must possess the

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[1] In her complaint, plaintiff Trout states that she was hired in March 1967. Trout Complaint ¶ 7. Plaintiff Perlingiero states that she was hired in October 1967. Perlingiero Complaint ¶ 67.

[2] The filing of a "charge" with the Equal Employment Opportunity Commission (EEOC) is a prerequisite to suit under Title VII. 42 U.S.C. § 2000e-16 (1976).

same interest and suffer the same injury shared by all members of the class he represents." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974).

It is easy to understand how the district court came to consider the hiring and initial placement issue, even though it was not properly presented. The original complaints, alleging individual and class discrimination, were filed in 1973. The theory of the case was that the defendnat had engaged in a "pattern or practice" of discrimination. Even though neither of the named plaintiffs alleged that they had been discriminated against with respect to hiring or initial placement, the class-aspects of their complaints asserted that the defendant had pursued discriminatory hiring and placement practices with respect to the class of women.[3] On April 6, 1973, the district court conditionally certified the class as consisting of "all past, present and future female professional technical employees of the defendant Naval Command System Support Activity." The certification order did not specify the issues for resolution.

During the 1960s and early 1970s, the "across the board" theory of discrimination in the class action-employment discrimination context was in vogue. This theory had its origins in the Fifth Circuit,[4] and essentially permitted a

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[3] Count One of the Trout Complaint alleges:

> 34. There exists at NAVCOSSACT a continuing and pervasive pattern of discrimination against women individually and as a class with respect to the recruiting and hiring of professional technical employees.

[4] The first "across the board" case which clearly held that a plaintiff could represent a class challenging alleged discriminatory employment practices to which he (individual plaintiff) had not actually been subjected was Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir. 1969).

The *Johnson* court's "across the board" approach was endorsed by commentators, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1218-22 (1971), and applied by trial courts, Mack v. General Electric Co., 329 F. Supp. 72, 73-76 (E.D. Pa. 1971); Wilson v. Monsanto Co., 315 F. Supp. 977, 979 (E.D. La. 1970); and Bateman v. Retail Credit Co., 320 F. Supp. 1115, 1116 (N.D. Ga. 1970).

plaintiff who alleged individual discrimination because of a particular employment practice to litigate class claims which included allegations of other, different discriminatory employment practices. Class claims which were broader than those asserted by the named plaintiff were considered a permissible "across the board" attack on the defendant's employment practices. *Long v. Sapp*, 502 F.2d 34, 40-43 (5th Cir. 1974); *Huff v. N.D. Cass Company of Alabama*, 485 F.2d 710, 714 (5th Cir. 1973); and *Carr v. Conoco Plastics, Inc.*, 423 F.2d 57, 62-66 (5th Cir.), *cert. denied*, 400 U.S. 951 (1970).

As jurisprudence on this subject developed, the "across the board" approach was generally repudiated[5] and the Supreme Court cautioned courts that the typicality requirement of Rule 23 of the Federal Rules of Civil Procedure and considerations of standing mandated that a named plaintiff must share the same injury as the class he purports to represent. In *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977), the Court held that plaintiffs alleging discrimination in denial of transfer could *not* maintain a class action challenging hiring by the defendant-

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Another Fifth Circuit case frequently cited as a forerunner in developing the "across the board" theory of class action-employment discrimination is Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968). In *Oatis*, however, the named plaintiffs alleged that they had, in fact, been injured by the same employment practices challenged by the class. Judge Bell, writing for the court, endorsed allowing a "board" attack against the defendant's employment practices, but recognized that the "issues that may be raised by plaintiff in ... a class action are *those issues that he has standing to raise*[,] i.e., the issues as to which he is aggrieved. ..." *Id.* at 499 (Emphasis added). Thus, subsequent reliance upon *Oatis* for the proposition that in an "across the board" attack a named-plaintiff may assert class claims based upon injuries which he did not suffer is misplaced. The *Oatis* court recognized that the issues raised in a class action must be identical to those issues which the named plaintiff has standing to raise.

[5] Courts of the Fifth Circuit continue to adhere to an "across the board" theory of standing in class suits, and attempt to distinguish the Court's decision in East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977). For a discussion of the Fifth Circuit's adherence to this theory, see Vuyanich v. Republic National Bank of Dallas, 505 F. Supp. 224, 234-37 (N.D. Tex. 1980).

employer. The Court reversed the Fifth Circuit's *sua sponte* class certifiction and imposition of class-wide liability, and held that these plaintiffs could not represent a class whose alleged injury they did not share. Numerous subsequent decisions recognized and applied the principle announced in *Rodriguez.*[6] Named plaintiffs cannot represent a class to litigate an issue which they themselves do not have standing to pursue.

On June 18, 1979, the *Trout* class was "fully certified" by the trial court. The conditional order of class certification was redefined to specify the class as follows.

> That the class is hereby determined to consist of all female professional technical employees employed by the Naval Command System Support Activity or the Navy Regional Data Automation Center at any time between June 6, 1972 and June 4, 1979.

Again, the court did not specify the scope of the class issues, and does not appear to have re-evaluated the propriety of these plaintiffs continuing to represent a class of women challenging discrimination in hiring and/or initial placement. However, by this date it was clear that a named plaintiff could only litigate, on behalf of a class, claims which she shared. Therefore, these plaintiffs could not litigate claims of discrimination in hiring and/or initial promotion on behalf of this class. As the Supreme Court "has repeatedly held, a class representative must be part of the class and 'possess the same interest and suffer the same in-

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[6] Abron v. Black & Decker (U.S.) Inc., 654 F.2d 951 (4th Cir. 1981) (district court *improperly* found class-wide liability for racial discrimination in "recruitment; job classification; hiring; assignment; promotion; transfer; discipline; discharge; benefits; apprenticeship training programs; compensation; terms, conditions and privileges of employment" when *only* claim presented by representative plaintiff was for discrimination with regard to a specific, temporary transfer); DeGrace v. Rumsfeld, 614 F.2d 796 (1st Cir. 1980) (plaintiff who did not claim that he had been discriminated against in the hiring process and whose "individual grievance—termination—did not implicate hiring procedures" could not represent class alleging racially discriminatory hiring); and Hill v. Western Elec. Co., Inc., 596 F.2d 99 (4th Cir. 1979) (plaintiffs alleging racial discrimination in work assignments and promotions cannot represent class challenging denial of employment).

jury' as the class members. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216." *East Texas Motor Freight, supra*, at 403. It is unquestioned that Trout and Perlingiero were *not* members of the class of discriminatees (applicants) they sought to represent. Therefore, their class claims could not encompass allegations of discrimination in hiring and/or initial placement.

That portion of the judgment against the defendant based upon the finding of class-wide discrimination in hiring and/or initial grade placement should therefore be *vacated* and the district court directed to dismiss those class claims.

In addition, the district court's improper consideration of claims of class-wide hiring and initial placement discrimination, which functions were exercised by other agencies, so permeated the trial court's evaluation of the evidence presented that its judgment of liability for discrimination in promotion cannot stand. As discussed *infra*, the promotion claim should be remanded to the district court for retrial. The sole issue for consideration, to which all proof must then be relevant, would be whether the defendant discriminated against women as a class in promotions during the relevant time period.

B. *Promotion Claims—Proper Evaluation of this Claim at Retrial*

A fundamental problem with the conduct of this case in the district court is that some basic tenants of employment discrimination-class action case law were ignored. The trial court appears to have confused the respective burdens of proof, ultimately finding against the defendant because it did not *disprove* the plaintiffs' allegations. Such procedure improperly allocates the burden of proof.[7]

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[7] In addition to not distinguishing between the respective burdens of proof and production incumbent upon a plaintiff and defendant, it appears that the court in several instances did not properly scrutinize the evidence.

This action was tried as a consolidated case, comprised of a class action and five individual actions. The court recognized that

> [t]he allegations made by these plaintiffs, and particularly those of Ms. Trout, are at best confusing in that major and minor com-

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Two theories for proof of employment discrimination in violation of Title VII have been recognized by the Court—disparate treatment or disparate impact. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977). In this case the plaintiff alleges that the employer followed a "pattern or practice" of disparate treatment of female employees that was discriminatory. To prevail upon a disparate treatment claim, plaintiffs must prove that a particular group (females) was regularly treated in a discriminatory fashion, and that this treatment was intentional—motive is essential.[8] Proof of disparate treatment may be by statistics or by instances of individual discrimination, or both.

In *individual* disparate treatment cases the Court has established "stages" of proof which are intended to simplify the factfinder's analysis of the evidence presented. The Court has emphasized that these "stages" do not alter the traditional burden of proof in a civil case.[9] A careful reading of *Texas Department of Community Affairs v. Burdine*, 450 U.S. 258 (1981) and its predecessors, highlights the conclusion that the Court was addressing the method of proving discrimination in the case of an *individ-*

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plaints are indiscriminately recited, sometimes without a clear delineation of what is claimed to be sex discrimination or retaliation and what is contended to be mere supporting data.

517 F. Supp. at 888 n.55.

This confusion in plaintiff's case was not completely unravelled by the court, both as to the individual claims (discussed *infra*) and the class claims. The court failed to distinguish between that statistical evidence which tended to prove plaintiffs' discriminatory hiring claims and that which went to the promotion claims.

[8] In a "pattern or practice" case, the plaintiff must prove:

> more than the mere occurrence of isolated or "accidental" or sporadic discriminatory acts. [The plaintiff must] establish by a preponderance of the evidence that . . . discrimination was the [employer's] standard operating procedure—the regular rather than the unusual practice.

Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977) (footnote omitted).

[9] "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253 (footnote omitted).

ual plaintiff. The "stages" which the court described cannot be mechanically applied to the case of *class litigation* of alleged employment discrimination. This is the error of the district court. (And the *court's* opinion here) As recognized in *Vuyanich v. Republic National Bank of Dallas*, 521 F. Supp. 656 (N.D. Tex. 1981), proof of employment discrimination in the class action context differs from that offered in the individual plaintiff case. The three "stages" applicable in the trial of an individual plaintiff's claim are merged into two in class litigation: (1) The plaintiff *initially* proves *both a "prima facie"* case and discrimination by a preponderance of the evidence. (2) Then, the defendant's proof must cast sufficient doubt on the plaintiff's proof (and statistics) "to cause the trier of fact to conclude that the plaintiff has not proved discrimination by a preponderance of the evidence." *Id.* at 663.

The district court in *Trout* was so concerned with the allocation of the "stages" of proof, focusing upon whether the plaintiffs established a *prima facie* case and whether the defendant rebutted that case, that it lost sight of the basic principle that plaintiffs were ultimately required to prove intentional discrimination by a preponderance of the evidence. It is submitted that, based upon the evidence presented, the ultimate burden of proof was not met.

Statements in the opinion for the court suggest a recognition of the fact that establishing a *prima facie* case might not always be the equivalent of proving discrimination by a preponderance of the evidence. At p. 12 the opinion states "while plaintiffs must demonstrate to the court's satisfaction that their statistical comparisons are meaningful, they need not present a perfect statistical analysis *at the prima facie case stage.*" (Emphasis added) This statement may constitute a recognition that additional proof may be required at some later stage in order to prevail on the merits. However, in this case, no additional proof was forthcoming—and the "inference" of discrimination which the district court drew from the plaintiffs' statistics became sufficiently probative for plaintiffs to prevail upon their claim of discrimination by a preponderance of the evidence. Upon examining the plaintiffs' evidence, I cannot agree that the

evidence which was sufficient to establish a *prima facie* showing was also sufficient to establish liability.

The only "facts" supporting the plaintiffs' claim were that (1) as undisputed, "the average salary for female employees at NARDAC has throughout the relevant period been considerably lower than that of males," 517 F. Supp. at 878; (2) that women were generally over-represented at the lower grade positions, *id.*; and (3) that the salary differential could only be accounted for by reference to the gender of the employee, *id.* at 879. Plaintiffs did not establish whether these facts were due to discrimination in hiring and initial placement (women being consistently hired only at the lower levels); or althrough hired properly, women were not being promoted as equitably as men; or whether because of a low rate of turnover, the effects of pre-1972 discrimination in hiring and promotion have not been eliminated, even though the defendant's employment practices are now neutral. Simply demonstrating that women earn less than men in this division, and that the earnings differential may only be explained by reference to gender, certainly *suggests* that discrimination has occurred, or may be occurring. But those facts do not, without more, *prove* discrimination in hiring or promotion.

Having found that the plaintiffs' statistics were sufficient to establish a *prima facie* case, the district court placed an improper burden upon the defendant to "rebut" such proof. It was incumbent upon the defendant only to raise genuine issues as to the sufficiency of the plaintiffs' evidence.[10]

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[10] Discussing the burden which falls upon an employer to respond to the plaintiff's *prima facie* proof in the class action context, the Supreme Court has explained:

> The burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the [plaintiff's] proof is either *inaccurate or insignificant.*

Teamsters, supra, at 360 (Emphasis added).

The opinion for the court suggests that the defendant failed to meet the plaintiffs' *prima facie* showing because it failed to introduce an acceptable statistical showing which would prove discrimination was *not* occurring. While the defendant was certainly free to introduce such proof, I believe that such proof was not necessary; to require such proof impermissibly burdens the defendant. As stated by the Court in

Presentation of such evidence by defendant would then return the "scales to equipoise," requiring the plaintiff to *prove* discrimination in order to prevail. To require any more proof from a defendant in response to the plaintiff's *prima facie* showing impermissibly shifts the burden of proof traditionally required in a civil case.

Contrary to the district court's conclusion, the defendant made three specific challenges to plaintiffs' statistics which raised a serious question as to the accuracy and/or sufficiency of the plaintiffs' proof. The defendant argued

1. that the statistics attributed responsibility to the defendant for hiring and initial placements, such decisions not being within the defendant's control;
2. that the statistics included the effects of time-barred acts; and
3. that the statistics did not take into account minimum objective qualifications.

These challenges to the accuracy of the plaintiffs' proof are designed to "discredit the plaintiff's statistics by demonstrating flaws in the assumptions, data or analyses presented." *Vuyanich v. Republic National Bank of Dallas*, 521 F. Supp. 656, 663 (N.D. Tex. 1981).

The opinion for the court concedes that the defendant successfully challenged the plaintiffs' proof of discrimination in hiring and initial placement, and yet this is not considered adequate to raise a "question" as to the sufficiency of the plaintiffs' statistics on the whole. The plaintiffs did not differentiate between their statistical evidence which tended to prove discrimination in hiring, and that which tended to prove discrimination in promotion. Based upon this lack of distinction, the defendant objected that the inference of discrimination which was drawn from these statistics was not attributable to it, if such inference was based upon alleged discriminatory hiring. The defendant's

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Teamsters, supra, the defendant need only clearly demonstrate *inaccuracies* in the plaintiff's proof, which then requires the plaintiff to respond and prove his case. A defendant may meet plaintiff's *prima facie* showing by *either* presenting its own set of acceptable statistics *or* by "other proof undermining plaintiff's claims." Segar v. Civiletti, 508 F. Supp. 690, 712 (D.D.C. 1981).

objection to plaintiffs' statistics, based upon its denial of liability for hiring and/or initial placement decisions, did raise a genuine issue as to the sufficiency of plaintiffs' proof.

The government's second challenge was that plaintiffs' statistics included pre-1972 data and that, therefore, any finding of discrimination based upon this data was not actionable.[11] The district court rejected this challenge stating that although discrimination prior to 1972 is not directly actionable, "in some circumstances (evidence of such conduct) can support the inference that such discrimination continued." 517 F.2d at 880. Suggesting that this defendant had discriminated prior to 1972, the court then stated that "such discrimination before 1972, even if coupled with *neutral employment practices* since then, produced actionable continuing discriminatory effects. . . ." *Id.* (Emphasis added). This is an *incorrect* application of the law.

In *Hazelwood School District v. United States*, 433 U.S. 299 (1977), it was held that an employer who discriminated before 1972, but who ceased upon enactment of the statute would not have violated the Act if after 1972 all employment decisions were made in a non-discriminatory fashion. Thus, if pre-Act practices produced discrimination, but discrimination ceased in 1972, the employer would *not* be liable for the "frozen-in" effects of discrimination. In my opinion the above-quoted statement by the district court to the contrary is erroneous.

This error in applying the law is not harmless in the context of this case. The government challenged the discrimination inferred from the plaintiffs' statistics by asserting that it was the result of pre-1972 practices. Therefore, it was incumbent upon the plaintiffs to prove that the discrimination suggested by their statistics was not due to non-actionable pre-Act conduct. This challenge to the plain-

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[11] In United Airlines, Inc. v. Evans, 431 U.S. 553 (1977), the Court stated that while evidence of pre-Act violations by the employer might be "relevant background evidence," such acts were "merely . . . unfortunate event[s] in history which ha[ve] *no present legal consequences.*" *Id.* at 558 (Emphasis added). Thus, this defendant's objection to the inclusion of pre-act practices in plaintiffs' statistics was based upon sound authority.

tiffs' statistics is valid and sufficient to raise a genuine issue as to the accuracy of the plaintiffs' statistical proof. The district court should not have disregarded the defendant's argument. 517 F.2d 879-80.

Two of the three government challenges to the accuracy of the plaintiffs' statistics were valid.[12] And yet, the district court did not find this sufficient to raise a question regarding plaintiffs' initial showing so as to require plaintiffs to introduce additional, more accurate and refined proof. Clearly the district court placed too great a burden of proof on the defendant, and based its ultimate finding of liability upon an insufficient showing by the plaintiffs. On a retrial plaintiffs must fully satisfy their burden of proof.

III. Individual Claims

A. *Perlingiero*

1. Denial of Promotion

This finding of liability for discriminatory denial of promotion should be reversed because the plaintiff failed, as a matter of law, to prove discrimination by a preponderance of the evidence.

Even though on appeal, the government specifically challenged both the district court's findings of ultimate liability and its finding that plaintiff Perlingiero had successfully established a *prima facie* case, without any analysis, the court's opinion "found no basis for upsetting the District Court's conclusions" on this issue. An examination of the record reveals that the government's challenge is well-taken.

In this Circuit, to establish a *prima facie* case of discriminatory refusal to promote, the plaintiff must

> show that she belongs to a protected group, that she was qualified for and applied for a promotion, that she was considered for and denied the promotion, and that other employees of similar qualifications who were not members of the protected group were indeed pro-

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[12] I defer to the district court's determination, upheld by the opinion for the court, that plaintiffs' statistical proxies adequately reflected the minimum objective qualifications. Op. at 14-16.

> moted at the time the plaintiff's request for promotion was denied.

Bundy v. Jackson, 461 F.2d 934, 951 (D.C. Cir. 1981). Herein, the district found that:

> a new layer of three supervisory positions was established at the GS-14 level; Ms. Perlingiero applied for all three; and all of them were again given to white males who were junior to her.

517 F. Supp. at 891.

This statement embodies the requisite elements of proof to establish a *prima facie* claim of discrimination in promotion.[13]

"To meet a prima facie case, a defendant must present with clarity and reasonable specificity a legitimate, nondiscriminatory reason for the action it took." *Valentino v. United States Postal Service*, 675 F.2d 56, 63 (D.C. Cir.

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[13] Because they are not "clearly erroneous," I defer to the district judge's factual findings which support the legal conclusion that a *prima facie* case was established. However, I am compelled to note that the plaintiff's evidence tending to establish a *prima facie* case was minimal. The plaintiff did not clearly identify who received the three promotions, and provided no evidence to support the court's finding that the individuals who were promoted were "junior to her." When asked how many promotions there had been in her code (unit) the plaintiff testified:

> there were *four* in my department, three of them went to white males, one person in particular that I knew fairly well who was a GS-9 in 1967 when I was a 12 was one of those promoted to a GS-14.

Tr. at 252. (Emphasis added.)

The plaintiff also introduced a letter from the Department of Defense's Office of Personnel and Security (dated 30 November 1979) informing her that she was not selected for the GS-334-14/15 position for which she applied. The letter stated

> you meet the qualifications required by this position, but you were not rated among the "best qualified."

I Jt. App. 324.

The foregoing is the *only* evidence cited by appellee, upon which the court could have based its conclusion that Perlingiero was discriminatorily denied promotion. Independent examination of the record has failed to reveal any additional evidence to support the court's conclusion.

1982). This "burden" on the defendant is *not* one of persuasion, but merely of "production." The defendant need only articulate a legitimate explanation for its choice; an employer is not required to "*persuade* the court that it was actually motivated by the proffered reasons." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). (Emphasis added). The Supreme Court has emphasized the nature of this "burden" on the defendant by reminding courts that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine, supra*, at 253.

Without explicating the facts supporting his conclusion, the district judge simply found that the defendant failed to rebut the plaintiff's *prima facie* case. However, as a matter of law, the defendant clearly rebutted the inference of discrimination by articulating a legitimate, nondiscriminatory reason for this plaintiff's nonpromotion. Testimony by the defendant's witness revealed that of the three positions available, two were selected at one point in time, and another selected later. The applicants for the positions were evaluated by a "rating and ranking panel." In both instances, plaintiff Perlingiero's name was not forwarded to the selecting officer on the list of "best qualified" candidates. Therefore, if she was discriminated against in this promotion decision, it was by the "rating and ranking" panel; testimony reveals, however, that each panel had women members.[14] The defendant's witness also explained why Perlingiero was not qualified to be recommended by the "rating and ranking" panel. The *plaintiff offered no evidence to contradict this testimony.*

In light of the defendant's explanation of the reasons for Perlingiero's non-promotion, and the showing that the decision-making process was fair, the defendant, as a matter of law, successfully rebutted plaintiff's *prima facie* case. To require the defendant to produce additional

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[14] In fact, Ms. Trout, the plaintiff in a companion case, was a member of the second "rating and ranking" panel which did not recommend Ms. Perlingiero for promotion.

"proof" would contradict the Court's requirement in *Burdine* and alter the traditional burdens of proof.

Once the defendant meets the plaintiff's *prima facie* proof, the plaintiff has "the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision." *Burdine, supra,* at 256. The plaintiff must carry the "ultimate burden" of persuading the court that "she has been the victim of intentional discrimination." *Id.* Plaintiffs offered no additional evidence to demonstrate that the defendant's explanation was merely pretextual, or to prove actual discriminatory treatment in this employment decision.

Reviewing all the evidence introduced by the plaintiff on this issue, in my opinion it is insufficient to sustain the legal conclusion that Perlingiero was intentionally discriminated against when she was *not* promoted to the GS-14 position in 1979.

2. Additional Alleged Acts of Discrimination

In support of its finding of liability for discrimination against Perlingiero the district court states that

> [s]he was repeatedly passed over for promotion in favor of males, some of whom had inferior credentials or were junior to her, and at least one of whom was clearly preselected for the position.

This conclusion is clearly erroneous as there is *no* evidence in the record to support it. In fact, the relevant evidence, from the plaintiff herself, contradicts this conclusion.

On cross-examination the plaintiff was unable to identify *any* promotions for which she had applied, with the exception of one in 1971 (prior to the effective date of Title VII) and the GS-14 position in 1979, discussed *supra*. To be repeatedly "passed over" for promotion within the Civil Service system one must have *applied* for a promotion.

For the foregoing reasons, the judgment in favor of Perlingiero must be vacated. This analysis is guided by the requirement that "as a matter of law" certain facts must be proven to prevail upon a claim of employment discrimination. I am compelled to disagree with the trial judge's judgment of liability (and the court's opinion affirming) because

I cannot find evidentiary support in the record which clearly establishes that plaintiff has proved the legal requisites necessary to support her claim.

B. *Bach*

Reviewing the record and the district court's findings and conclusions on Bach's claim, I agree with the court's opinion affirming the judgment against the defendant.

CONCLUSION

In my view the court's opinion in material respects "glosses-over" serious problems with the judgment of the district court. I thus dissent to the extent indicated above.

APPENDIX B

UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA.

April 16, 1981
Civ. A. Nos. 73-55, 76-315, 76-1206, 78-1098

YVONNE G. TROUT, ET AL., PLAINTIFFS,

v.

EDWARD HIDALGO, ET AL., DEFENDANTS.

CHARLENE HARDY, PLAINTIFF,

v.

EDWARD HIDALGO, ET AL., DEFENDANTS.

MARIE LOUISE BACH, ET AL., PLAINTIFFS,

v.

EDWARD HIDALGO, ET AL., DEFENDANTS.

YVONNE G. TROUT, PLAINTIFF,

v.

EDWARD HIDALGO, ET AL., DEFENDANTS.

OPINION

HAROLD H. GREENE, District Judge.

These four consolidated cases raise individual and class sex discrimination claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*[1] The defendants in all of these actions are officials of the De-

[1] Although plaintiff Bach, in Civil Action No. 76-1206, also asserts a claim under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 633a (1974), plaintiffs did not argue this claim in their trial brief and the statistical evidence at trial was devoted exclusively to sex discrimination. By order filed December 13, 1976, the Court struck the claims for relief involving individual disciplinary action.

partment of the Navy and an agency of the Department of the Navy formerly referred to as the Naval Command Support Activity (NAVCOSSACT) and, since March, 1977, as the Navy Regional Data Automation Center (NARDAC).[2]

NAVCOSSACT was established in 1962 as the center of Navy computer operations for national defense purposes. The organization grew from about 250 employees in 1962 to one employing over 1,000 individuals in the late 1960's. By the early 1970's, however, lesser United States involvement in foreign conflicts and fiscal restraints placed upon the agency resulted in a reduction in the size of the organization, and consequently fewer high-grade employees were authorized and fewer promotions occurred. In 1977, NAVCOSSACT was dissolved in the course of a reorganization of the Navy's automated data processing activities (ADP), and its personnel and resources were combined with personnel and resources of the Navy Material Command Support Activity, the Navy Accounting and Finance Center, and the Naval District Washington, D.C., to form NARDAC. NARDAC develops computer systems and documents for computer systems, trains personnel in the operations of systems, and delivers the systems to user organizations.

Plaintiffs Yvonne G. Trout and Clara Perlingiero, both computer systems analysts, brought the first of the currently-pending actions, Civil Action No. 73-55, and they are also the representatives of the class previously conditionally and now fully certified in that case consisting of "all female professional technical employees employed by [NAVCOSSACT] or [NARDAC] at any time between June 6, 1972, and June 4, 1979." Trout is also the plaintiff in Civil Action No. 78-1098, in which she alleges retaliatory actions arising from her initial claim. Charlene Hardy, the plaintiff in Civil Action No. 76-315, is a retired computer programmer from NARDAC and a member of the designated class. Marie Louise Bach, a NARDAC security manager, and

[2] For the sake of simplicity, both of these agencies as well as the several individual defendants are generally hereinafter referred to as NARDAC.

Joan Swann Creighton, director of the NARDAC Training Department, are the plaintiffs in Civil Action No. 76-1206, but they are not members of the class.

I

The class action aspects of this lawsuit involve an alleged pattern and practice of sex discrimination in defendants' hiring, performance evaluation, job assignment, promotion, and award procedures. Their resolution revolves primarily around the statistics submitted by the parties and the analysis of those statistics by the parties' experts.[3] As might be expected, the evidence adduced by plaintiffs in these areas differs sharply from that advanced by defendants. Moreover, as will be explained below, neither analysis is wholly free from defects or ambiguities. Some of these problems are attributable to the underlying data (see note 4 *infra*) while others are to a degree inherent in the various methods of analysis (see, *e.g.*, 884 *infra*) which almost inevitably required those performing them to make trade-offs in terms of inclusiveness and specificity. On balance, however, for the reasons indicated below, the court finds plaintiffs' statistical proof to be the more reliable.

That proof consists essentially of multiple regression analyses of raw statistical data furnished to plaintiffs by defendants in the course of discovery.[4] Multiple regression is

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[3] However, as discussed in Part IV *infra*, testimony concerning actual personnel practices was also adduced on the class action issues.

[4] The data used by both parties' experts for statistical analysis consisted of a computer tape and a computer printout furnished to plaintiffs by defendants in response to an interrogatory. The tape included eighteen recent job actions taken with respect to each employee from 1970 to 1979, as well as the employee's age, sex, date of entry in federal service, date of hire by, and departure from, NARDAC, and the prior employing agency. The printout included age, sex, educational level, date of entry in federal service, date of hire by NAVCOSSACT, and all job actions between 1972 and 1977. These data, from which all subsequent analyses were derived, were first requested by plaintiffs on May 9, 1980, five weeks before the trial began. Some of the deficiencies in the parties' statistical analysis can be traced directly to certain gaps in these two sources of data. Had either party focused its attention earlier on the critical role statistical analysis would play

a statistical technique designed to estimate the effects of several independent variables on a single dependent variable. Properly used in a case such as this, the methodology provides the ability to determine how much influence factors such as sex, experience, and education each have had on determining the value of a variable such as salary level.[5] The analysis also enables an observer to cumulate effects of the various factors so as to determine the degree to which explanation of the dependent variable can be attributed to the independent variables in combination.[6] Regression analysis is well recognized by the literature and the courts in Title VII litigation.[7]

Plaintiffs' expert[8] began his analysis with the undisputed fact that the average salary for female employees at NARDAC has throughout the relevant period been considerably lower than that of males. At the beginning of that period, in 1972, women earned $2,700 less than men, that is, 82 percent of the male salaries; at the end of the period, in 1979, women earned $4,300 less than men, or 84 percent of the male salaries.[9] The salary differentials throughout

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in the proof of this case, it might have been possible to obtain and analyze the personnel records themselves as a basis for more accurate determinations.

[5] See Fisher, Multiple Repression in Legal Proceedings, 80 Colum.L.Rev. 702, 721-25 (1980).

[6] The best measure of the degree of explanation of movement of the dependent variable by the model is known as R^2. A value for R^2 of 1.0 represents total explanation; zero indicates no explanation.

[7] *See, e.g., Presseisen v. Swarthmore College*, 442 F.Supp. 593 (E.D.Pa.1977), *aff'd*, 582 F.2d 1275 (3rd Cir. 1978); *Agarwal v. McKee and Co.*, 16 E.P.D. ¶ 8301 (N.D.Cal.1977); *Wade v. Mississippi Cooperative Extension Service*, 528 F.2d 508, 514 (5th Cir. 1976); *Pennsylvania v. Local 542, Operating Engineers*, 469 F.Supp. 329, 15 E.P.D. ¶ 9028 (E.D.Pa.1978); Finkelstein, The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases, 80 Column.L.Rev. 737 (1980); Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 Harv.L.Rev. 387 (1975); Fisher, *supra* note 5.

[8] Plaintiffs' principal expert was Mahlon R. Straszheim, Ph.D., a professor of economics at the University of Maryland.

[9] The relative decrease in the percentage gap when compared to the increase in the dollar gap is accounted for by inflation.

this period reflect the relative concentration of women in NARDAC in the lower civil service grade levels. During that period, women constituted about 20 percent of the NARDAC labor force. They were consistently overrepresented in the lower grades, with their share varying between 21 and 50 percent for GS-7 through GS-11 and between 42 and 100 percent for GS-5, and they were with equal consistency underrepresented in the upper grades, where they occupied between 3 and 10 percent of the jobs at GS-14 and above. In the middle positions there also was a contrast, although it was less stark. Women held approximately 24 percent of the GS-12 positions, and about 10 percent of the GS-13 positions.

With these salary differentials clearly established, plaintiffs' expert sought to determine next, on a year-by-year basis between 1972 and 1979,[10] whether the disparity could be accounted for by differences between men and women in education and experience,[11] or whether it was more likely to be attributable to sex discrimination. To accomplish this analysis, the expert witness specified for regression a linear model which included dummy variables for level of education,[12] years of NARDAC service, years of other government employment service, years of potential nongovernment experience between date of receipt of last educational degree and date of entry in federal service, and sex.[13] The dependent variable was salary.

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[10] No regression was run for 1978.

[11] Experience and education were largely determinative of salary at NARDAC. In 1972, for example, each year of service at the agency tended to increase the salary level by $1,209, each year of service at other federal agencies by $194, and each year of "nonfederal service" by $152. Employees with graduate degrees tended to receive $3,788 more than those with no college experience.

[12] The 1979 regression model did not include education variables because education data were unavailable. Plaintiffs' expert reported that this alternative specification altered the magnitude of the sex coefficient only slightly and did not change the statistical significance of the coefficient.

[13] For a discussion of the problems surrounding the accuracy of the experience and education factors used by plaintiffs, see Part III *infra*.

When prior experience and education were thus taken into account, female employees still received substantially lower salaries than men, the yearly differential attributable to sex ranging from $2,200 to $3,500.[14] Since there never was any suggestion by the government that factors other than education or experience could legitimately account for the differences,[15] the Court would clearly have been justified, absent some explanation, to draw the conclusion that equally qualified female employees of NARDAC consistently received lower salaries on the average than male employees and, accordingly, that they had been the victims of improper discrimination.

II

The government's answer to plaintiffs' statistical case was two-fold. It argues initially that various defects in the analysis renders its ultimate conclusions unreliable and that, inasmuch as plaintiffs have the burden of proof, this unreliability demands that judgment be entered against

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[14] Women received $2,271 less than men in 1972, $2,189 less in 1973, $3,437 less in 1974, $2,547 less in 1975, $2,885 less in 1976, $3,106 less in 1977, and $3,109 less in 1979. These differences in salaries were statistically significant at the .01 level, that is, they would be expected to arise by chance less than one percent of the time if there were no discrimination based on sex. In each regression, all of the other variables showed up as significant at the .01 level, with the exception of the dummy variables for college. The R^2's, representing the explanatory fit of the model overall range from .42 to .64. Plaintiffs' expert also performed several variant regressions, including running of the 1979 model using a population of employees hired only since 1972, when Title VII became applicable to federal employees; running of the 1979 model using subpopulations categorized by agency origin within NARDAC; and running of data for both 1977 and 1979 using a logarithmic, rather than a linear, equation. Each of these variants produced statistically significant results which were wholly consistent with those of the basic model. The expert finally offered evidence to show that women were treated less favorably than men in grade level placement in hiring and promotion decisions. Because this evidence merely amounted to a repetition of evidence already built into the regression conclusions, and was substantially less probative than the regression analysis, the Court has not considered it on an independent basis.

[15] See note 11 *supra;* but see also 879-881 *infra*.

them. Additionally, the government presented statistical evidence through its own experts, arguing that, even if plaintiffs' statistical analysis were deemed to constitute a prima facie case, that case was adequately rebutted by the government's statistical findings. The Court considers each of these arguments in turn.

The government's objections to the reliability of plaintiffs' statistically-based conclusions may be summarized as follows. First, it is claimed that plaintiffs' expert improperly permitted pre-1972 statistical evidence and evidence of other agencies' actions to intrude into his analyses. In this regard, defendants assert that the inclusion of individuals hired before 1972 (when Title VII was not applicable to federal employees) and of individuals who transferred from other federal agencies (whose salaries were presumably already predetermined) would inappropriately subject the defendants to liability for actions that either were not legally cognizable when they occurred or were attributable to agencies other than NARDAC. Second, defendants argue that plaintiffs' expert failed to include in his analysis several relevant factors and that for this reason the coefficient suggesting discrimination was biased. And third, it is contended that the experience factor used by plaintiffs' expert, who included as experience the entire period between completion of education and hiring by the government, reflects not so much actual experience as merely age.

A. Defendants' objection to the failure of plaintiffs' expert to eliminate all pre-1972 data is not as persuasive as might appear at first blush. Although discriminatory conduct which occurred solely prior to March 24, 1972, is not directly actionable in Title VII suits against the federal government,[16] it has been recognized that evidence of such conduct can

> in some circumstances support the inference that such discrimination continued, particularly where relevant

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[16] *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977).

aspects of the decision-making process had undergone little change.[17]

Between 1967 and 1972, NARDAC engaged in a number of practices which unfairly discriminated or had the strong potential to discriminate against women—among them the conducting of evaluations of employees on a subjective basis by male supervisors;[18] the failure to advertise promotion opportunities; and the preselection of male employees for higher level positions by male supervisors. It is likely that such discrimination before 1972, even if coupled with neutral employment practices since then, produced actionable continuing discriminatory effects after 1972, particularly since Civil Service regulations patterned after the so-called Whitten Amendment (5 C.F.R. § 300.602 (1968); P.L. 253, 82d Cong., 1st Sess. (1951)), constrained the maximum allowable rate of grade promotion.[19] Under these

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[17] *Hazelwood, supra*, 433 U.S. at 309 n.15, 97 S.Ct. at 2742 n.15. For example, on that basis, if promotion decisions within the period of legal responsibility indicate an adverse impact on a protected group, but there is too small a sample within that period on which to base a finding of statistical significance, the data for earlier periods may be aggregated with the information for more recent periods. See Finkelstein, *supra* note 7, at 746; *Vera v. Bethlehem Steel Corp.*, 448 F.Supp. 610, 615 (M.D.Pa. 1978); *Parson v. Kaiser Aluminum and Chemical Corp.*, 575 F.2d 1374, 1385, *rehearing denied*, 583 F.2d 132 (5th Cir. 1978); *Patterson v. Youngstown Sheet and Tube Co.*, 440 F.Supp. 409, 411-13 (N.D.Ind. 1977).

[18] All of the department and division heads and other management officials at NARDAC (with the exception of one black male) were white males. Of the approximately 215 to 220 project leaders, only 6 were women. See *Rowe v.General Motors Corp.*, 457 F.2d 348, 358-59 (5th Cir. 1972); *Ste. Marie v. Eastern Railroad Ass'n*, 458 F.Supp. 1147, 1162 (S.D.N.Y.1978); *Neely v. Grenada*, 438 F.Supp. 390, 407-08 (N.D.Miss.1977); *Stastny v. Southern Bell Tel. & Tel. Co.*, 458 F.Supp. 314, 345-46 (W.D.N.C.1978); *Kyriazi v. Western Electric Co.*, 461 F.Supp. 894, 923 (D.N.J.1978).

[19] The situation is analogous to the effect of racial discrimination by labor unions that is succeeded by use of neutral seniority rules, or of discriminatory voting registration practices followed by neutral, but particularly arduous, requirements. In such cases, courts have not hesitated to hold that "freezing" the effects of prior discrimination is actionable. See, *e.g.*, *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 450-51 (5th Cir. 1971); *Quarles v. Philip Morris, Inc.*, 279

circumstances, it was appropriate for plaintiffs' expert not to exclude completely the effects of pre-1972 conditions.[20]

With regard to defendants' objection that plaintiffs included employees who transferred from other agencies with "predetermined grades and salaries," NARDAC did not make a convincing showing that it had no control over initial grade determinations.[21] Although the agency was, of course, entitled to attempt to demonstrate in its own statistical analysis that if grade placement decisions by other agencies were excluded no vestige of discriminatory results would remain, the Court could not appropriately dismiss plaintiffs' own analytical conclusion upon that basis. The logical product of defendants' theory would be a requirement that plaintiffs in Title VII cases must join as defendants all government agencies from which any employees ever transferred—a proposition which suggests that the objection is not compelling.[22]

B. The other objections made by defendants to plaintiffs' statistics essentially raise legal issues relating to the burden of proof. Certainly, plaintiffs' expert did not, in his analysis, account for each of the factors that the government suggests should have been considered. It is also true that a model which incorporated additional potentially rele-

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F.Supp. 505, 516 (E.D.Va.1968); *United States v. Dogan*, 314 F.2d 767, 772-73 (5th Cir. 1963).

[20] No practical method of separating the effects of pre-1972 and post-1972 discrimination in regression analysis was suggested by defendants or is readily apparent. See *Segar v. Civiletti*, 508 F.Supp. 690, at 697 (D.D.C.1981). Plaintiffs did perform one regression including solely employees hired after 1972 and found statistically significant discrimination in salaries. That study, however, was not a suitable replacement for broader regressions, if only because its exclusion of long-time employees precluded analysis of promotion practices in higher grades.

[21] See 885-886 *infra*, for a discussion of the issue regarding NARDAC's liability for initial grade determinations, which in significant respect also applies to transferees.

[22] A court recently dealt with the identical issue by assuming that, in the absence of evidence to the contrary, transferor agencies and transferee agencies discriminated equally. See *Segar v. Civiletti*, *supra*, 508 F.Supp. at p. 699 n.4.

vant factors (such as type or quality of education and experience) would form a more perfect foundation for determinations regarding allegations of discrimination. However, defendants have furnished no evidence that inclusion of the missing variables or refinement of others would have altered rejection of the hypothesis of no discrimination. Indeed, they failed to offer any evidence indicating that type of education and experience or quantity of experience per age was distributed unequally among the women and men in the NARDAC population.

To be sure, defendants did suggest that technical, computer-related education and experience are not equally distributed in the general population between men and women,[23] and they have also argued that women are more likely than men to leave the labor force to raise children, and, hence that on the average they possess less experience per age than men. However, the generalities offered by lay witnesses on these subjects are inadequate, by themselves, to undermine plaintiffs' analysis. Certainly, the Court would not be justified in accepting mere sex stereotypes as an adequate rebuttal. What was required in this circumstance was substantial, expert supporting evidence keyed to the population here involved, but such evidence was not forthcoming. See *Vuyanich v. Republic National Bank*, 505 F. Supp. 224 (N.D.Tex. 1980).

C. Thus, the basic question is—have the plaintiffs satisfied their burden of proof by adducing the type of statistical evidence that they did, or were they affirmatively and as part of their own case required to do more?[24]

Under current law, a plaintiff has the burden of establishing a prima facie case of sex discrimination under Title VII.[25] In class action litigation under that statute, statis-

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[23] Census data were submitted in support of this proposition.

[24] In an ideal world, all of the necessary proof would be fully available, and the decision could then be said to be based on correctness to a scientific and mathematical certainty. However, in an actual trial context, the Court must, absent unusual circumstances, make its decision on the basis of what evidence has been presented.

[25] Under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the plaintiff in a Title VII case has the

tics often play an important role in both parties' claims regarding the existence of discrimination.[26] Indeed, statistics alone may suffice to establish a prima facie case.[27] As the Supreme Court made it clear in *Hazelwood School District v. United States*, *supra*, 433 U.S. at 307-08, 97 S.Ct. at 2741-42,

> [w]here gross statistical disparties can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.[28]

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burden of establishing a prima facie case; the defendant may then rebut the prima facie case by demonstrating legitimate business reasons for the apparent discrimination, and plaintiff may then attempt to show that the reasons given amount to a pretext. See *Texas Department of Community Affairs v. Burdine*, ___ U.S. ___, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

[26] See *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977).

[27] *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *United States v. International Union of Elevator Constructors, Local No. 5*, 538 F.2d 1012, 1015 n.6 (3rd Cir. 1976); *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 259 (3rd Cir. 1975); *Davis v. Califano*, 613 F.2d 957 (D.C.Cir.1979).

[28] Where racial or sex-based disparities are particularly gross, plaintiffs have often relied on mere percentage differentials between the work force and the general population to base a claim of discrimination (see B. Schlei and P. Grossman, *Employment Discrimination Law*, 332 nn.80-82 (1979 Supp.), although, as the Supreme Court pointed out in *Hazelwood*, *supra*, 433 U.S. at 308 n. 13, 97 S.Ct. at 2742 n. 13, such comparisons are only highly probative when skills required for the job are ones "that many persons possess or can fairly readily acquire." Some courts have also allowed such data to be used for skilled or managerial positions, but more generally plaintiffs alleging discrimination in non-entry-level jobs have been required to produce statistical evidence comparing the composition of the work force with the makeup of the segment of the population possessing the qualifications relevant to the jobs at issue. See Schlei and Grossman, *supra*, at 322-23 nn. 83-84, 86-90. Similarly, when the focus of the suit is alleged discrimination in promotion decisions, some courts have held that evidence of a disparity in the composition of entry-level jobs relative to upper-level jobs constitutes a prima facie case, while others have required that plaintiff compare only those entry-level jobholders demonstrably qualified for promotion with employees holding high positions. See *id.* at 324-25 nn. 92-93.

As indicated, parties in complicated Title VII actions are increasingly using multiple regression analysis, such as that conducted in the instant case, to separate the phenomenon of discrimination from a myriad of innocent interacting factors.[29] While such analysis can assist significantly in making the refined and sophisticated judgments required,[30] it would be erroneous to impose upon the party relying upon this technique the burden of incorporating every conceivable refinement and disproving every contingency. As Professor Finkelstein has pointed out,[31]

> [i]n criticizing models it is possible to speculate endlessly that different data, forms of equation, or explanatory variables would yield significantly different and superior results. Compelling definite calculations will bring such easy speculation down to earth.[32]

In the case at hand, plaintiffs used regression analysis to attempt to eliminate such possible explanations for the sala-

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[29] "Multiple regression is well suited to [distinguish sex discrimination from differences in qualifications such as education and experience] fairly precisely. Moreover, without a multiple regression study it is difficult to see how it could be decided. The raw comparison of average wages for women and for men may make one suspicious, but it cannot tell one anything definite." Fisher, *supra* note 5, at 721.

[30] The Court does not interpret *Movement for Opportunity v. General Motors Corp.*, 622 F.2d 1235 (7th Cir. 1980), which is heavily relied upon by defendants, to the contrary. In that case, in which the court found defendants' work force "flow" statistics more probative on the issue of discrimination than plaintiffs' statistics, plaintiffs merely compared work force percentages with potential work force composition figures and did not perform any regression analysis. On the basis of that evidence, moreover, the court held that plaintiffs had made a prima facie showing, albeit one that defendants adequately rebutted.

[31] Finkelstein, Regression Models in Administrative Proceedings, 86 Harv. L. Rev. 1442, 1466 (1973).

[32] Judge Robinson of this Court recently adopted this same position in *Segar v. Civiletti*, *supra*, when he held, at p. 712, that

> [w]hen a plaintiff submits accurate statistical data, and a defendant alleges that relevant variables are excluded, defendant may not rely on hypothesis to lessen the probative value of plaintiff's statistical proof. Rather, defendant, in his rebuttal presentation, must either rework plaintiff's statistics incorporating the omitted factors or present other proof undermining plaintiff's claims.

ry differentials as educational and experience factors. They succeeded in doing so to a substantial extent. The government argues, in essence, that because plaintiffs did not refine the variables in their regression to an absolute degree, they failed in meeting the required burden of proof. The Court declines to impose upon Title VII plaintiffs so impractical a requirement.

This conclusion is especially compelling when, as here, the deficiencies in plaintiffs' statistical proof may to a substantial extent be attributed to the defendants. In the course of discovery, plaintiffs requested NARDAC's computerized personnel records describing employees' grade, salary, promotion, training, job performance, education, and prior employment experience, among other information. Defendants replied that much of the information was unavailable, and they furnished instead a computer tape which provided only the data used by plaintiffs' expert in preparing his statistical analysis. To be sure, plaintiffs' request was made relatively late in the history of this long-pending litigation. Nevertheless, plaintiffs cannot legitimately be faulted for gaps in their statistical analysis when the information necessary to close those gaps was possessed only by defendants and was not furnished either to plaintiffs or to the Court.[33]

D. Defendants rely to the contrary principally upon two cases in which courts have criticized regression analyses.

In *Agarwal v. McKee and Co.*, 16 E.P.D. ¶ 8301 (N.D. Cal. 1977), the plaintiffs sought to support their claims of racial discrimination with a multiple regression, but the Court refused to credit the findings of discrimination, citing that their failure to include variables representing types of education and types of experience. In the view of that court, regressions which aggregate individuals of all posi-

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[33] See *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1297 (8th Cir. 1978); *Dickerson v. United States Steel Corp.*, 439 F.Supp. 55, 80 n. 27 (E.D.Pa.1977), *rev'd on other grounds*, 582 F.2d 827 (3rd Cir. 1978). One clear purpose of discrimination law is to force employers to bring their employment processes into the open. See Note, *Employment Testing: The Aftermath of Griggs v. Duke Power Company*, 72 Col.L.Rev. 900, 908 (1972).

tions, and which treat "all job positions as fungible, involving equal levels of knowledge, skill and responsibility" are invalid. 16 E.P.D. at 5581. In the instant case, all members of the class are professional technical employees with generally similar job skills, and it is not at all clear that the *Agarwal* ruling would be pertinent here.[34] In any event, the Court does not agree with the view that an aggregation across job lines necessarily destroys the probative value of regressions. Absent a demonstration that such an aggregation imports a bias into the conclusions, the methodology is not inappropriate. Indeed, as is discussed in more detail below, the technique is superior to methods which entail a fragmentation into populations so small that statistical analysis loses much of its power to find any discrimination.[35] To the extent that *Agarwal* may be read as suggesting that type and quality of education and experience must always be included in a valid statistical model proposed by a Title VII plaintiff, it appears to be simply wrong and has for that reason been justly criticized. In the words of Professor Finkelstein,

> The failure to code type or quality of prior experience or education should more properly fall on the employer than on the plaintiff, since such coding would be relevant only to the extent the employer could demon-

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[34] A position similar to that taken by the court in *Agarwal* was also expressed in a recent decision of Judge Gasch of this District. See *Valentino v. United States Postal Service*, 511 F.Supp. 917 at 957 (D.D.C.1981). Defendants' reliance upon that case in this context is likewise misplaced, and for similar reasons. The class in that action included "economists, computer experts, business managers, personnelists, engineers, statisticians, lawyers, accountants, and secretaries." At p. 940. The instant case, of course, involves no such aggregation of disparate occupations.

[35] Defendants' response to plaintiffs' expert's objection to the aggregation by year only in defendants' promotion analysis was that the most accurate analysis would have been to disaggregate by each separate promotion decision. See Defendants' Post-Trial Brief Regarding Statistics pp. 10-11 n. 4. Although defendants are correct that no inaccuracies are introduced by such disaggregation, it is also true that no comparative information is generated until individual cases are aggregated. The cost of following defendants' suggestion seems inordinately high.

strate that differences in type of education or prior employment experience were validly related to the requirements of the job.[36]

In *Presseisen v. Swarthmore College*, 442 F. Supp. 593 (E.D.Pa. 1977), *aff'd*, 582 F.2d 1275 (3rd Cir. 1978), both parties conducted sophisticated regression studies to buttress their contentions regarding the practice of sex discrimination in faculty employment decisions. The court in that case found that neither side had adequately supported its own regression analysis, and in that posture it saw only two basic alternatives: to ignore both sets of statistical analysis or to consider both studies as if they suffered no defects. After concluding that it did "not believe that the statistics give rise to any inference whatsoever," it held that plaintiffs had not made out a prima facie case. That conclusion, however, must be viewed in the peculiar context in which it arose. The action was brought by faculty members at a liberal arts college, and the court's decision necessarily was colored by the fact that it is difficult to quantify and thus to incorporate into a regression analysis such factors as scholarship, teaching ability, and the like, which play a predominant role in employment decisions at such an institution.[37] The instant case does not to the same degree involve factors of such elusiveness. Moreover, defendants here did not offer their own regressions to correct the deficiencies they complained of in plaintiffs' analysis.[38]

For the reasons stated, the Court rejects the various objections proffered by the government and it concludes that, based upon the statistics, plaintiffs have established a prima facie case of sex discrimination in initial grade place-

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[36] Finkelstein, Judicial Reception, *supra* note 7, at p. 744. It may be noted, too, that the court did not hold that the plaintiffs had failed to meet their burden of proof but merely that they did not adequately refute defendant's presentation of legitimate nondiscriminatory reasons for its conduct.

[37] See also, *Marimont v. Califano*, 464 F.Supp. 1220, 1227 (D.D.C. 1979); Finkelstein, *supra* note 7, at p. 744.

[38] See 886-887 *infra*, for a discussion of the regressions defendants did conduct.

ment and promotion against the class of professional technical women employed at NARDAC.

III

To rebut this prima facie case, the government, through its experts,[39] introduced its own statistical evidence. This evidence, based essentially upon the same data as that used by plaintiffs, consisted of a so-called cohort analysis and various independent regressions.[40]

A. The cohort analysis examined the flow of male and female employees of the same grade level through NARDAC's promotional system. The experts divided the work force into groups by the year in which the employees joined the agency and the GS grade at which they entered. The promotion experiences of each of these groups or "cohorts" over time were examined to compare the relative progress of men and women. On the basis of this analysis, the government's experts concluded that NARDAC's promotion system had not had any disportionately adverse impact on female employees.

Although defendants' statistics did support that conclusion, several defects inherent in their use of the statistics severely mitigate its force.[41]

First and foremost, the cohort analysis necessarily divided the population under examination into extremely small segments or groups.[42] As population size decreases, a dis-

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[39] Defendants' experts were Peter Lewin, Ph.D., assistant professor of economics, University of Texas at Dallas; and Robert R. Hill, Ph.D., assistant professor, Texas A&M University.

[40] Defendants also offered a promotion analysis to refute allegations of discriminatory promotion practices. However, because this analysis suffers from a number of the same defects that limit the probative value of defendants' other statistical analysis (such as excessive disaggregation and inability to reflect discrimination in hiring, see *infra*) and is inherently less probative than regression analysis (see pp. 877-878, 882 *supra*), it does not significantly assist defendants.

[41] In a similar situation, it has been said of cohort analysis (*Segar v. Civiletti*, *supra*, at p. 712), that it "was irreparably flawed ... and is devoid of probative value."

[42] For example, many of the cohorts contain only two, three, or four employees.

parity must be increasingly large to be statistically significant, for the division of observations into small groups necessarily reduces the detectable level of significance. See *International Brotherhood of Teamsters v. United States*, *supra*, 431 U.S. at 340, 97 S.Ct. at 1856; *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620-21, 94 S.Ct. 1323, 1333-34, 39 L.Ed.2d 630 (1974); *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 Harv. L.Rev. 387, 417-18 (1975). The failure of the government's analysis to reject, in many instances, the hypothesis of no discrimination in promotions is in large measure attributable to the fact that it selected a statistical method with extraordinarily low power to detect sex-based disparities.

Second, the analysis does not include any cohort which was composed solely of men or solely of women.[43] As a result, 15 percent of the women and 38 percent of the men were excluded from the analysis,[44] again severely restricting the usefulness of any conclusions drawn from data.

Third, the analysis conducted by defendants' experts assumed that the employees studied were placed in an appropriate salary grade at the outset, and it therefore could not and did not detect any bias in the hiring and placement process.[45] The government appears to justify this ignoring of possible discrimination in initial placement with the argument that NARDAC had no influence on placement decisions, which were allegedly completely controlled by the Civil Service Commission, and that NARDAC therefore would not be legally liable for any bias at time of hiring.

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[43] Such cohorts are necessarily excluded, because there is no way to make a comparison between men and women for a cohort with employees of only one sex.

[44] Defendants offered no evidence that the exclusion of these employees did not bias their conclusions.

[45] For example, a male high school graduate and a female with an advanced degree who were hired improperly at the same grade in a particular year would, under the cohort method, continue to be inappropriately studied as if they always belonged at the same grade level. Moreover, if the woman subsequently were ever promoted more rapidly than her male counterpart, her case would be counted as evidencing discrimination in favor of, rather than against, women.

However, whatever may have been the formalistic Civil Service classification system, defendants failed to demonstrate that NARDAC had no influence on initial grade placement decisions. In fact, the interplay among job description, assignment to positions, distribution of duties, and classification standards leaves ample room for flexible treatment and hence for variation and discrimination. See also, *e.g.*, 880 *supra* and note 67 *infra*.

Furthermore, even if all authority for improper initial grade placement were assumed to rest with the Civil Service Commission, the resulting disparities in grade level remaining over several years could still be properly attributable to NARDAC. In such a case, either NARDAC failed to promote equitably individuals who were discriminated against at hiring (which would constitute direct discrimination by NARDAC) or operation of the Whitten Amendment regulations locked in the effect of the earlier discrimination (see 880 *supra*). In either event, the assumption implicit in defendants' statistics that discrimination in initial placement is irrelevant to the case is incorrect and undermines their analysis.

Fourth, defendants' cohort analysis did not take into account pre-1972 discrimination. Yet, although the government bears no legal responsibility *per se* for pre-1972 actions, as indicated *supra* (879-880) such actions should have been considered to the extent that they continued to affect post-1972 salary levels.[46]

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[46] Defendants point to two recent decisions as sustaining contrary conclusions. In *O'Brien v. Sky Chiefs, Inc.*, 23 FEP Cas. 65 (N.D. Cal. 1980), cohort analysis was used to controvert allegations of sex discrimination. But in that case the statistical evidence adduced by the plaintiffs consisted only of percentage disparities in rank, and the court quite properly granted summary judgment to defendants, after finding that neither party's evidence contradicted the other's and that plaintiffs had not made out a prima facie showing of discrimination. In the instant case, by contrast, the statistical evidence is conflicting, and the Court has already concluded that plaintiffs have proved a prima facie case.

Judge Gasch of this Court, in *Valentino v. U.S. Postal Service*, *supra*, entered judgment for defendant after a trial that included complicated statistical evidence. In that case, as in this one, plaintiffs pro-

Because of the deficiencies described above, the Court finds defendants' cohort analyses to be insufficiently reliable to rebut plaintiffs' case.

B. The remaining statistical evidence offered by defendants consisted primarily of regression analysis. Again, there were several shortcomings with the presentation of these studies, each of which is independently sufficient to render them inadequate to rebut plaintiffs' prima facie case of discrimination.

As pointed out above, defendants did not choose to perform any regressions correcting the specification errors they claimed afflicted plaintiffs' regressions. In an employment discrimination case, in which the defendant employer has the greatest access to potentially relevant employment data, the burden is on it to produce and use such data in developing its statistical case (see 882-883 *supra*). Defendants' failure to include the variables of type of education and experience and a more accurate measure of quantity of experience in their regressions must be interpreted as a concession that these refinements in the specification of the model would not have affected the rejection of the hypothesis of no discrimination.

Further, several of the regressions defendants did perform were not themselves offered as evidence. Instead, defendants relied on a few sparse sentences of descriptions of regressions allegedly performed, claiming that they revealed no unfavorable treatment of women. The cursory nature of the support for this conclusion, in four consolidated cases in which seven years of litigation have generated thousands of pages of documentation and argument, re-

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duced multiple regression analyses as part of their prima facie case, and defendant offered cohort analyses and regressions in rebuttal. Some of the factors leading the Court there to conclude that defendant's statistical evidence was more probative than plaintiffs', such as improper aggregation of disparate occupations, are not present here. Beyond that, this Court respectfully differs with a number of other conclusions reached in that case: *e.g.*, the appropriateness of regressing salary on grade level in a suit alleging discrimination in initial placement and promotion; the proper treatment of possible pre-1972 discrimination; and the usefulness of regression analysis given its inability to account for intangible factors.

quires the Court to assign little probative weight to this finding.[47]

Finally, the regressions that defendants both performed and offered into evidence with enough specificity to be entitled to consideration are inadequate to rebut plaintiffs' case. Defendants regressed the log of salary on the education, experience, and sex of NARDAC employees who had been hired since 1972 and who had not transferred from other government agencies. As noted *supra*, for various reasons, including the use of small populations necessitated by the restrictions upon the employees included by defendants, the power of the analysis to detect sex discrimination was significantly eroded.[48] The Court therefore concludes that these regressions are entitled to little weight.

For all of the above reasons, the Court finds that defendants' evidence has not "raise[d] a genuine issue of fact as to whether [they] discriminated against the plaintiff[s]." *Texas Department of Community Affairs v. Burdine*, *supra*, ____ U.S. at ____, 101 S.Ct. at 1091. Because defendants have failed to produce evidence that would allow the Court to conclude that they did not unlawfully discriminate, the Court, applying the burden-of-production rule articulated by the Supreme Court in *Burdine*, finds that defendants have not rebutted plaintiffs' prima facie case of discrimination.

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[47] One such regression, it is clear from the description, would not be entitled to weight, even if introduced into evidence. By including grade level when hired as an independent variable, the experts improperly absolved defendants from any liability for discriminatory initial grade placement. It is commonly accepted that it is inappropriate to include as an independent variable a factor within defendants' control unless it has been established that they did not discriminate in exercising that control. See *Presseisen*, *supra*, 442 F.Supp. at p. 614; and see, 885-886 *supra*.

[48] The low power of the model can be observed from the fact that almost all of the education variables in these regressions were likewise not statistically significant. This, of course, does not prove that educational achievement had no effect on salaries at NARDAC.

IV

The Court having concluded that plaintiffs have established a *prima facie* case and that defendants have been unable to rebut their proof, might leave the matter to rest there, with judgment on the class action aspects of this suit being entered for plaintiffs on that basis alone. However, the Court has considered evidence other than the statistics in support of and in opposition to the class action claim, and it finds that such evidence substantially strengthens the conclusion that plaintiffs are entitled to a finding in their favor.

There was testimony from a number of present and former employees of NARDAC concerning various discriminatory practices, long after 1972, including a denial of supervisory opportunities to women, assignment of women to lower level positions, and the preselection[49] of men for supervisory positions.[50] The Court was especially impressed by the testimony of several former employees of the agency who were very credible witnesses and who related both specific instances and general impressions of discrimination against women at NARDAC. Some of these individuals left NARDAC for other federal employment and thereafter advanced to higher grades far more rapidly than had been possible at NARDAC.[51]

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[49] Several government witnesses conceded that preselection was occurring at various times at the agency. Compare Federal Personnel Manual, chapter 335, subchapter 3.

[50] Additionally, Judge June Green of this Court found discrimination on the basis of "sex or race" against one black female employee of NARDAC. *Robinson v. Warner*, 8 E.P.D. ¶ 9452 (D.D.C.1974). And see, notes 66 and 67 *infra* and text thereto.

[51] For example, Ann Eakin testified that a "buddy system" operated at NARDAC from which women were excluded; women were seldom given project leader status; and they were generally retained in the less desirable programming and documentation areas. When she transferred to the Veterans Administration she quickly advanced to a GS-13. Stacy Day, who left NARDAC to join the United States Marshal's Service, testified that career opportunities were few for women at NARDAC, and men were being given most of the more desirable assignments. Kathy Schabaker and Crystal Halichi both supported this

Defendants' witnesses denied the existence of discrimination in the areas under their control. However, several of them testified that preselection and failure to post vacancy announcements had been practices within the agency, and another conceded that the technical shortcomings which impeded the advancement of one of the plaintiffs herein had been overlooked in the case of at least one male. Overall, defendants' witnesses, whatever their subjective beliefs, and indeed their individual good faith, fell far short of rebutting plaintiffs' proof of entrenched sex discrimination.

The evidence compels the conclusion that during the years in question NARDAC was an agency—perhaps not atypical in Navy terms during the period—where men were expected to be in positions of leadership and where women were relegated to tasks involving less authority, less discretion, less opportunity, and less pay.

For the reasons stated, the Court concludes that plaintiffs have proved discrimination against the class, that defendants have been unable to refute that proof, and that the class of plaintiffs are entitled to judgment in their favor.[52]

V

In addition to the class action, suit was brought on behalf of five individual plaintiffs.[53] Some of these individuals have proved discrimination or retaliatory action;[54] others have not.

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testimony; and both advanced far more rapidly after they left NARDAC than they had before.

[52] The relief aspects are discussed in Part VI *infra*.

[53] The testimony of the individual plaintiffs also tended, in varying degrees, to support the class action aspects of this lawsuit.

[54] In order to prevail on a retaliatory action claim, a plaintiff must demonstrate a causal connection between protected activities and adverse action. See, *e.g.*, *EEOC v. Locals 14 and 15*, 438 F.Supp. 876 (S.D.N.Y.1977).

A. Yvonne Trout complains primarily[55] that (1) she was transferred on a detail in 1970 from one part of NARDAC where she claims to have performed well to another with which she was unfamiliar and for which she was less well suited; and (2) in 1975,[56] after she had been detailed as an acting program manager to the Automated Data Processing Program Reporting System (ADPPRS) program, reprisals were taken against her on account of her EEO complaints and her advocacy of the rights of women employees.

Ms. Trout objected to the 1970 transfer on the ground that it constituted unfair labor practice and violated her rights as a federal employee. Nevertheless, it is clear that the agency's action was legitimate. A need arose in the agency for computer systems analysts and programmers in a higher priority project, and Ms. Trout as well as a male

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[55] The allegations made by these plaintiffs, and particularly those of Ms. Trout, are at best confusing in that major and minor complaints are indiscriminately recited, sometimes without a clear delineation of what is claimed to be sex discrimination or retaliation and what is contended to be mere supporting data. Since 1975, Ms. Trout has filed at least five additional EEO complaints, the last one in February 1980. Thus, she complained, *inter alia*, that in 1972 she was improperly passed over for six promotions and that after filing a grievance her rank on a technical evaluation roster was substantially reduced. The 1972 promotion actions did not involve discrimination on account of sex: two of the individuals promoted were women. However, it appeared that merit promotion procedures had not been strictly followed, and Ms. Trout was for that reason granted a promotion to GS-14. As for the technical evaluation roster, the diminished level of her performance is corroborated by a Letter of Caution and Requirement Ms. Trout received on April 13, 1971, which indicates a "failure to perform to the level of [her] assessed capability." Of the remaining complaints, one involved the closing of a door by another program manager who sought to escape a dispute with Ms. Trout; another was directed at, among others, male and female employees of the Navy, the Department of Justice, and the U.S. Attorney's Office; and the last one involves a promotion to GS-15 she unsuccessfully sought. While not all of these matters are discussed in this Opinion, the Court has considered all of the allegations properly before it and the evidence relating to them, and finds the complaints to be without merit. (It may also be noted that Ms. Trout was hired by NARDAC after interviews with three men all of whom, according to her allegations, are part of a pattern of sex discrimination against her at the agency.)

[56] This complaint is embodied in No. 78-1098.

computer analyst were detailed to that project. The individual who made the selection, and who was a credible witness, testified that she was chosen only because of [*sic*] she appeared well suited for this assignment. Following her objections, and after a four-day hearing,[57] all the complaints were rejected. Almost two years later, Ms. Trout for the first time injected the issue of sex discrimination.[58] However, in addition to being late, the claim, for the reasons detailed above, wholly lacks substantive merit.

Ms. Trout's 1975 program was cancelled essentially because she was a poor manager and because the program, largely for that reason, did not meet with success. Because of her abrasiveness, a number of her most expert subordinates left, and she generally found it difficult to work with their replacements, whether men or women. The program Ms. Trout headed at the time was an important one for NARDAC and that agency had no interest in seeing it fail, through cancellation or otherwise. Ultimately it turned out, however, that in view of the lack of success the program had achieved under her leadership, there was no realistic choice other than to cancel it.[59] The Court finds that none of the actions surrounding the 1975 program cancellation were motivated either by discrimination or by retaliation.

There is no question but that this particular plaintiff has had problems at NARDAC, but these problems were essentially due to her personality rather than her sex. Throughout her tenure at the agency, Ms. Trout complained, almost incessantly, often about extremely petty bureaucratic matters.[60] While no doubt this plaintiff is highly intelligent, she was not as successful at NARDAC as

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[57] There also were numerous informal conferences with the commanding officer and others.

[58] For that reason, her sex discrimination complaint may well be untimely.

[59] Nevertheless, Ms. Trout retained her GS-14 grade.

[60] A female co-worker, Lois Henry, testified that Ms. Trout informed her that she would let the project slip two years, and "embarrass the hell out of" NARDAC's commanding officer. Daniel Foster, a black supervisor at NARDAC, stated that he was "outraged" by Ms. Trout and that he regarded her actions as amounting to strong and persistent insubordination.

she expected to be largely because she has consistently been unwilling to accommodate herself to the legitimate needs and concerns of her supervisors, coworkers, and subordinates,[61] whether male or female.[62] Notwithstanding its conclusion regarding the class, the Court finds that Ms. Trout has failed to prove her individual claims with respect to either of the actions she has brought, and these claims will be dismissed.

B. Marie Bach,[63] security specialist in charge of automatic data processing (ADP), was removed from her position in 1976, and a younger white male was placed in charge of the program. The reason given for this change was that her successor, because of his computer background, was better able to carry out the ADP security functions. The Court finds this to have been a mere pretext for discrimination on account of sex.[64]

While there are legitimate differences of opinion on the technical issue of whether ADP security specialists should more appropriately have a background in security or one in data processing, the evidence here shows that these technical issues were not the predominant reasons for the personnel actions regarding this plaintiff. Ms. Bach was described by most witnesses as a highly respected security

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[61] Charles Bremer, a principal target of Ms. Trout's complaints, testified that Ms. Trout was almost constantly badgering him and that she represented the most difficult experience of his professional life. The Court regards Bremer as a credible witness.

[62] For example, at the time of the 1970 transfer, she consistently and abrasively objected to the detail, keeping a public "count down" calendar. Again, when a controversy ensued between plaintiff and one of her supervisors regarding a female lieutenant he had hired, she became embroiled in that particular controversy although she had promised that she would not become involved in personnel matters outside her immediate jurisdiction.

[63] Ms. Bach is the plaintiff in No. 1206-76, but she is not a member of the class in No. 55-73 because she was not a professional technical employee of NARDAC.

[64] The Court also discounts the explanations provided by NARDAC management that Ms. Bach was being transferred to give her policy-making authority.

manager.[65] It is also clear that computer analysts work frequently, if not usually, under the supervision of security specialists, and that the latter ordinarily have overall responsibility for ADP security systems. That, indeed, was the situation at NARDAC until Ms. Bach's removal in 1976.

Rear Admiral Nance, who at the time of that removal was in charge of Navy equal employment opportunity matters, ordered that all of her duties be returned to her.[66] NARDAC complied temporarily and with obvious reluctance, but ultimately it carried out its original plans, to the detriment of this plaintiff.[67]

For the reasons stated, the Court finds that plaintiff Bach has sustained her burden of proof with regard to her claim under Title VII, that defendants have failed to rebut that proof, and that she is entitled to a judgment in her favor.

C. Charlene Hardy[68] complained about failure to receive training to which she claims to have been entitled, and the receipt of a Letter of Caution and Requirement and a Letter of Reprimand in 1974. The Court finds that there is no merit to her complaints.

Ms. Hardy was not permitted to attend a seminar in advanced computer technology because the course was too complex given her experience and abilities and because of several other shortcomings from which she suffered, in par-

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[65] The head of ADP security inspections under the Chief Navy Material Command described her as one of the best such managers he had ever observed.

[66] Admiral Nance also directed that plaintiff's performance evaluation rating be upgraded, that an EEO committee closely monitor opportunities for management development among women at NARDAC, and that EEO training be given to managers and supervisors at the agency.

[67] Among other discriminatory actions taken against Ms. Bach were the award of unwarranted inferior performance ratings (which were not upgraded notwithstanding Admiral Nance's orders); the removal of her office to an undesirable location; failure to provide her with appropriate training; and failure to classify her position at a grade comparable to that of other security specialists in the Navy with similar functions.

[68] Ms. Hardy is the plaintiff in No. 76-315 and she is also a member of the class in No. 55-73.

ticular her habitual tardiness. Insofar as the two disciplinary letters were concerned, they were fully justified by her performance. Ms. Hardy arrived late on so many occasions that she had amply exhausted her leave.[69] She was counseled a number of times,[70] and when ultimately her leave record failed to improve, she was given a letter of reprimand. The patience NARDAC exhibited with respect to this particular employee was the antithesis of discrimination.

The Court finds that defendants did not violate Title VII in their treatment of Ms. Hardy either with respect to the matters referred to above or in any other respect,[71] and her complaint will accordingly be dismissed.[72]

D. Clara Perlingiero's[73] complaint originated with a reorganization in 1971 of an important ADPPRS project in which she had been an assistant project leader performing satisfactory work. As a result of the reorganization, more people were assigned to this project, it was renamed Code 70, and three white males were appointed to supervise it. One of the new supervisors, Charles Bremer, was placed in charge, and he soon received a promotion to GS-15. Another new supervisor, Robert W. MacPhail, a retired military officer who had little background in computers and none in ADPPRS, was rapidly promoted to a GS-14 position that had not been advertised competitively. Ms. Perlingiero alleges that MacPhail was preselected for that position, and her allegation in that regard is supported to an extent by the acknowledgement of a defense witness that preselection

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[69] Leave without pay was first denied but then granted.

[70] Plaintiff had a number of family problems which contributed to her tardiness. The agency, commendably, adjusted her work hours to allow her to take care of her family obligations, but her attendance did not improve.

[71] Likewise unsupported are her claim that she was pressured not to file an EEO complaint and that she was instructed, for discriminatory or retaliatory reasons, not to associate with another black female employee of NARDAC.

[72] Ms. Hardy voluntarily resigned from the federal service in 1976 after the birth of a child.

[73] Ms. Perlingiero is a named plaintiff and class representative in No. 73-55.

did occur, apparently fairly routinely, during that period. At the same time, Ms. Perlingiero remained at her GS-12 level and was given only low-level programmer's duties and responsibilities.

Immediately after she filed a complaint of discrimination in 1972, Ms. Perlingiero's evaluation dropped from the top one-third to the very bottom of the GS-12 group at the agency. At about the same time, she was transferred to the communications systems department; she was given no supervisory training or assignments which would enhance her promotion potential; and she was kept in the communications systems department from 1972 until September, 1979.[74] In January of 1974, the Navy concluded that procedural irregularities had occurred in connection with applications Ms. Perlingiero had made in 1972 and promoted her to GS-13, her present rank.

In September, 1979, plaintiff was made a project leader. However, she remained at her GS-13 rank even though her male predecessor had been a GS-14, and she apparently was given lower level duties and responsibilities than those which had been exercised by that predecessor. In addition, a new layer of three supervisory positions was established at the GS-14 level; Ms. Perlingiero applied for all three; and all of them were again given to white males who were junior to her.[75]

In May, 1980,[76] Ms. Perlingiero's title was changed from project leader to "point of contact." She testified that, once again, her responsibilities were being eroded in favor of male supervisors, and she also complained of an announced transfer of her communications systems group to Chelthenham, Maryland, as part of the Naval Telecommunica-

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[74] This plaintiff had no background whatever in the subject matters under the jurisdiction of that department.

[75] Plaintiff claims that these individuals, too, were preselected.

[76] Inasmuch as the entire matter involving this plaintiff was before the Court, it has also considered the 1980 claim. See, *e.g.*, *Silver v. Mohasco Corp.*, 602 F.2d 1083 (2d Cir. 1979), *rev'd on other grounds*, 447 U.S. 807, 100 S.Ct. 2486, 65 L.Ed.2d 532 (1980); *Ortega v. Construction & General Laborers' Union No. 390*, 396 F.Supp. 976, 980 (D.Conn.1975).

tions Command, a change she alleges is retaliatory and will further adversely impact her career.

Several of her supervisors testified to Ms. Perlingiero's shortcomings in some technical fields, claiming that the real leaders in her department were in systems programs rather than in analysis, and that she simply lacks the background to advance. However, the Court is convinced that the various actions taken against this plaintiff were based on sex discrimination and on retaliation, as distinguished from objective efficiency-related factors. Ms. Perlingiero's evaluations were favorable until she filed her EEO complaints; she was thereafter given the lowest possible rating and then transferred to a department in which she had no background. She was repeatedly passed over for promotion in favor of males, some of whom had inferior credentials or were junior to her, and at least one of whom clearly was preselected for the position. Finally, she has been deprived of assignments commensurate with her various positions, responsibilities, and assignments that would have enabled her to prove her ability and to advance to higher-level positions. For the foregoing reasons, the Court finds that this plaintiff has sustained her burden of proof with regard to her claim under Title VII and that defendants have not rebutted this proof, and judgment will accordingly be entered in her favor.

E. Joan Creighton[77] complains primarily[78] about her removal from her administrative position and her downgrading to a lower ranked job, and secondarily about the fact that, while she is presently acting as an interim director of training, she has not been granted that position on a permanent basis.

Ms. Creighton was hired in 1974 at a GS-11 level as an assistant to Murray Silverman, a GS-15 computer systems analyst who had been performing personnel duties for the

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[77] Ms. Creighton is a plaintiff in No. 78-1206, but she is not a member of the class in No. 55-73 because she is not a female professional technical employee of NARDAC.

[78] Like the other individual plaintiffs, Ms. Creighton also raised a host of lesser issues and grievances. All of these matters have been fully considered by the Court.

commanding officer. In December, 1975, when Silverman's resignation became effective, Ms. Creighton took over his personnel duties. At about the same time, she was promoted to a GS-12.

The major reorganization of the Navy ADP in 1977 combined NAVCOSSACT, for which Ms. Creighton worked, with three other organizations to form NARDAC.[79] The direction of the personnel office of the new organization, to which Ms. Creighton aspired, was given to one Lois Henry, a female with a GS-13 who had been performing similar personnel duties for NMCSA, one of the other merged organizations, and Ms. Creighton became her subordinate.

The defendants' evidence showed that Ms. Creighton's performance as personnel director had been poor, and several witnesses testified that she ran a disorganized office.[80] Lois Henry, who was given the position to which Ms. Creighton aspired, was clearly better qualified by every appropriate measure, and there was nothing improper about this personnel action. The court finds that sex discrimination or reprisals were not even remotely involved.[81]

In 1977, Ms. Creighton was transferred to the Training Department, and she has been the acting director of that department since that time. The director position has been classified GS-13 in the GS 334 computer series. Ms. Creighton herself, who is classified in the GS 301 personnel series, cannot qualify for the computer series classification because she does not have the technical background to supervise computer specialists in their technical duties. The Court is convinced that defendants are making a good faith effort to reclassify Ms. Creighton's position so that she can qualify for a GS-13. If and when that occurs, she will presumably be promoted. In short, this particular plaintiff has failed to sustain her complaints of discrimination and retali-

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[79] See 876 *supra*.

[80] In contrast, Ms. Henry's performance had been rated outstanding.

[81] Capt. Paul Pfeiffer, commanding officer of NARDAC, testified that Ms. Creighton told him that Captain Clairmont (the previous commanding officer) had made a mistake and that she intended to get some money out of it.

ation with sufficient evidence, and her claim will accordingly be dismissed.

VI

The briefs submitted by the parties thus far have not focused to any substantial extent on the relief that should be granted herein, particularly with respect to the class. Accordingly, the parties shall, within twenty days hereof, submit memoranda discussing methods for the determination of entitlement to relief on behalf both of the individual plaintiffs and of the members of the class. These proposals should include a discussion of the feasibility and desirability of making individualized determinations for all individuals potentially entitled to relief as opposed to utilization of some averaging formula.[82] In this connection, the parties should also address the specific procedures, formulas, and other relevant details applicable to each method.

The parties shall also address the question whether the relief issues should be resolved by the Court, by a Magistrate, or by a special master. Finally, the parties' submissions should discuss the relationship between the relief for the named plaintiffs and the relief for members of the class. Within ten days of the filing of the memoranda, reply memoranda dealing with these various issues may be submitted.

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[82] If an averaging formula is used, it might include reliance upon the statistics presented to the Court.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2370
Civil Action No. 73-00055

YVONNE G. TROUT, ET AL.

v.

JOHN F. LEHMAN, JR., SECRETARY OF NAVY, ET AL., APPELLANTS

No. 81-2373
Civil Action No. 76-01206

MARIE LOUISE BACH, ET AL.

v.

JOHN F. LEHMAN, JR., AS SECRETARY OF NAVY, ET AL., APPELLANTS

No. 82-1304
Civil Action No. 76-01206

MARIE LOUISE BACH, ET AL.

v.

JOHN F. LEHMAN, JR., ET AL., APPELLANTS

No. 82-1305
Civil Action 73-00055

YVONNE G. TROUT, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED, ET AL.

v.

JOHN F. LEHMAN, JR., SECRETARY OF THE NAVY, ET AL., APPELLANTS

BEFORE: EDWARDS, Circuit Judge; MACKINNON and SWYGERT*, Senior Circuit Judges

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*Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

ORDER

On consideration of the Petition for Rehearing of Appellants, filed May 4, 1983, it is

ORDERED by the Court that the aforesaid Petition is denied.

FOR THE COURT:

George A. Fisher
Clerk

BY: Robert A. Bonner

ROBERT A. BONNER
Chief Deputy Clerk

Senior Circuit Judge MacKinnon would grant the Petition for Rehearing.

Filed May 31, 1983

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2370
Civil Action No. 73-00055

YVONNE G. TROUT, ET AL.

v.

JOHN F. LEHMAN, JR., SECRETARY OF NAVY, ET AL.,
APPELLANTS

No. 81-2373
Civil Action No. 76-01206

MARIE LOUISE BACH, ET AL.

v.

JOHN F. LEHMAN, JR., AS SECRETARY OF NAVY, ET AL.,
APPELLANTS

No. 82-1304
Civil Action No. 76-01206

MARIE LOUISE BACH, ET AL.

v.

JOHN F. LEHMAN, JR., ET AL., APPELLANTS

No. 82-1305
Civil Action 73-00055

YVONNE G. TROUT, INDIVIDUALLY AND ON BEHALF OF
OTHERS SIMILARLY SITUATED, ET AL.

v.

JOHN F. LEHMAN, JR., SECRETARY OF THE NAVY, ET AL.,
APPELLANTS

BEFORE: ROBINSON, Chief Judge, WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK AND SCALIA, Circuit Judges, and MACKINNON, Senior Circuit Judge

ORDER

Appellants' Suggestion for Rehearing *en banc* has been transmitted to the full Court. A majority of the judges in regular active service have not voted in favor of the suggestion. On consideration of the foregoing, it is

ORDERED by the Court, *en banc*, that the aforesaid suggestion is denied.

FOR THE COURT:

George A. Fisher
Clerk

BY: Robert A. Bonner

ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges Tamm, Wilkey and Bork would grant the Suggestion. Senior Circuit Judge MacKinnon, an active Circuit Judge at the time of voting, would also grant the Suggestion.

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